90-1732

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

ROBERT T. NICOLS,

Petitioner,

v.

LYNNE J. NICOLS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

- AND APPENDICES -

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QUESTIONS PRESENTED

I.

WHETHER THE SUBSTANTIAL FEDERAL QUESTIONS CREATED BY THE STATE TRIAL COURT'S VIOLATION OF THE PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS HAVE BEEN SUFFICIENTLY PRESERVED TO PROPERLY INVOKE THE JURISDICTION OF THIS COURT?

II.

WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS PROPERTY INTERESTS IN HIS MARITAL ESTATE WERE DISTRIBUTED WITHOUT HIS CONSENT AND IN VIOLATION OF THE PROCEDURAL SAFEGUARDS AFFORDED BY THE MICHIGAN COURT RULES?

III.

WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS PROPERTY INTERESTS IN HIS MARITAL ESTATE WERE DISTRIBUTED IN VIOLATION OF THE PROTECTIONS PROVIDED BY THE MICHIGAN STATUTE OF FRAUDS ENACTMENTS?

IV.

WHETHER PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS PROPERTY INTERESTS IN HIS MARITAL ESTATE WERE DISTRIBUTED BY JUDICIAL ACTIONS WHICH WERE CLEARLY ARBITRARY AND CAPRICIOUS?

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

❧ ❧ ❧

CITATION TO OPINIONS BELOW

The decision of the Michigan Supreme Court was entered below on January 28, 1991. That decision was in the form of an order denying reconsideration of the Court's earlier order of October 30, 1990 denying leave to appeal from the *per curiam* decision of the Michigan Court of Appeals. The January 28, 1991 order is included as Appendix A. The October 30, 1990 order is included as Appendix B.

The *per curiam* opinion of the Michigan Court of Appeals was entered on November 15, 1989, as No. 111262 (unpublished). That opinion is included as Appendix C.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on January 28, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

A. SUMMARY CASE HISTORY

Petitioner seeks issuance of a writ of certiorari for review of the decision rendered below by the Michigan Supreme Court. That decision affirmed without opinion an earlier ruling of the Michigan Court of Appeals that Petitioner had entered into a binding divorce settlement agreement. Petitioner challenges this ruling.

Appendix D sets out the judgment of the trial court, which was rendered on August 12, 1988. Petitioner appealed this judgment to the Michigan Court of Appeals. As noted earlier, the *per curiam* opinion of that Court affirming the trial court was entered on November 15, 1989 and is found at Appendix C.

Petitioner applied for leave to appeal that opinion to the Michigan Supreme Court. It denied Petitioner's application by its order of October 30, 1990 which is attached as Appendix B. Petitioner moved for reconsideration of this denial, but the Court denied his motion on January 28, 1991. That denial is embodied in the order of the same date attached as Appendix A.

B. UNDERLYING CASE FACTS

The Respondent, Mrs. Nicols, filed her divorce complaint in February, 1985. (See Docket Entry of February 21, 1985. Docket Entries, hereinafter "D/E," are included as Appendix E.) During the three and one-half years the case was pending, extensive discovery was conducted. The trial court — presumably due to the complexity and extent of the marital estate — ordered Mrs. Nicols and the Petitioner, Mr. Nicols, to mediation. On or about October 1, 1986, the parties stipulated to the appointment of a mediator: Robert Feldstein. The Order of Mediation provided that if a settlement had *not* been reached, the mediator was to file a recommendation with the court which could be read by the court "for the purpose of assisting the court in understanding the issues involved." The Order of Mediation is included as Appendix F.

The Order also referred to then-applicable General Court Rule (GCR) 316. Under GCR 316, failure to file a written acceptance within twenty days after the mailing of a mediation evaluation constituted a rejection. No such acceptance was ever filed.

On February 27, 1988, the parties participated in an all-day mediation. (App. G, G-40, G-42) (T: 8/5/88: 253-4, 296) That session was the only mediation proceeding at which the parties were present. After approximately eight hours, the parties believed a tentative agreement had been reached. The mediator recited an outline of some of the terms of the proposed agreement on dictating equipment in the presence of the parties and their respective counsel. (App. G, G-40 – G-41) (T: 8/5/88: 254, 273) At the con-

clusion of dictation, the mediator asked the parties whether each understood the proposed settlement and agreed to its basic terms which contemplated the future drafting and execution of a complete settlement agreement. (App. G, G-40, G-41) (T: 8/5/88: 253-4, 273)

Initially, Mr. Nicols indicated that he wanted to consult with his accountants over the remainder of the weekend and respond thereafter. (App. G, G-41) (T: 8/5/88: 273) The mediator, however, refused his request and insisted that a decision be made on the spot. (App. G, G-41) (T: 8/5/88: 273) Shortly thereafter, the Petitioner gave in and responded in the affirmative. (App. G, G-42) (T: 8/5/88: 273) The Respondent also assented in response to the mediator's inquiry. (App. G, G-41) (T: 8/5/88: 254)

The mediator made no specific findings of fact. The parties never signed an agreement or any other document evidencing an agreement. The only document that was produced was an outline by the mediator delineating the basic terms of the tentative agreement which he also transmitted to the court. (Included as Appendix H and hereinafter referred to as the "Feldstein Memorandum" or "Memorandum.") The cover letter accompanying the Feldstein Memorandum explicitly indicated that "counsel will, in the very near future, accomplish such clarification or refinement of these terms and conditions as may be necessary" and that the Memorandum was to "assist counsel." (App. H) Neither of the parties nor their counsel signed the Memorandum, and, as admitted in the mediator's cover letter, it was "rather clumsy." No mediation acceptance of the Feldstein Memorandum was filed by either party.

It was anticipated that additional language, negotiations, and signed writings would be completed before the terms of the tentative settlement would become enforceable. Mrs. Nicols' counsel was to prepare a proposed settlement agreement and judgment based, in part, on the mediator's transcribed outline. (App. G, G-40, G-41) (T: 8/5/88: 254) As noted by the Respondent below, the proposed judgment was

required to be submitted *and approved* by Petitioner's counsel. (App. G, G-3) (T: 3/7/88: 5-6) Similarly, the proposed property settlement was to be reviewed and executed by the parties.

Based on the request of the Respondent's counsel that testimony be preserved as to the marriage and its breakdown, a hearing was held on March 7, 1988. This was the date which had originally been set for trial. Counsel for both parties appeared. Proofs were taken from Mrs. Nicols regarding the breakdown of the marriage and other statutory matters. (App. G, G-1–G-3) (T: 3/7/88: 2-6) At that time, the Feldstein Memorandum was marked as "Exhibit 1" by counsel for Mrs. Nicols and offered into evidence.

Petitioner's counsel, however, did not stipulate to the entry of that exhibit. Rather, he indicated to the trial court on the record that it was his understanding that the parties would later enter into a settlement agreement separate from the judgment. (App. G, G-3) (T: 3/7/88: 6-7) He further indicated that the Memorandum was only the mediator's "first draft" and but an "outline" of the terms that would ultimately be developed into a settlement agreement, with some "enunciates [*sic*] and details" which the parties were to ultimately include in the settlement agreement. (App. G, G-3) (T: 3/7/88: 6-7) In fact, the parties contemplated that the settlement agreement would not even be made part of the public record. (App. G, G-3) (T: 3/7/88: 6) The Respondent's subsequent submission of a proposed judgment incorporating the terms of a "property settlement" violated this important understanding.

The trial court indicated from the bench that it was satisfied that the proofs presented to that point established the requisite breakdown of the marriage and that it would grant an absolute judgment of divorce. (App. G, G-4) (T: 3/7/88: 7) Respondent's counsel interposed, however, that it was understood by the parties that a dissolution of the marriage would *not* be effective until the final judgment. (App. G, G-4) (T: 3/7/88: 7-8) That judgment

would presumably incorporate a separate, finalized property settlement agreement to be drafted subsequently by counsel for Mrs. Nicols.

The court then agreed that it had nothing before it at that time upon which to make an immediate pronouncement. (App. G, G-4) (T: 3/7/88: 8) Mrs. Nicols' counsel stated: "It is understood by the parties, Your Honor, that the judgment should be effective upon entry of the judgment of divorce. The Court is not making an immediate pronouncement." The Court responded: "I don't have anything before me at this time that I may do so." (App. G, G-4) (T: 3/7/88: 7-8) The matter was adjourned with the understanding that Mrs. Nicols' counsel would promptly prepare and submit a first draft of a proposed Judgment, separate Settlement Agreement and Qualified Domestic Relations Order, or "QDRO."

It was not until *April*, 1988, that Mrs. Nicols' counsel submitted the first draft of the proposed Settlement Agreement, Judgment and Qualified Domestic Relations Order to Petitioner's counsel to review. (App. G, G-5) (T: 5/18/88: 2-3) Those documents contained terms different from, and additional to, those discussed during the mediation.

While these documents were being reviewed, Mrs. Nicols' counsel grew impatient and unilaterally breached the understanding that a separate settlement agreement would be prepared and that its terms not be made part of the public record. She redrafted a new proposed judgment incorporating the terms which everyone had previously agreed would not be made public. Mrs. Nicols' counsel unilaterally motioned this new proposed Judgment and QDRO up for presentation on May 18, 1988. (App. E, D/E of 5/10/88) This action was taken despite the inability of the parties to reach agreement and Respondent's failure to comply with the provisions of either former GCR 316 or Michigan Court Rule (MCR) 3.211, which was the mediation rule for domestic relations actions in effect when this matter was mediated. The Petitioner filed his Objections.

On May 18, 1988, when the parties appeared at the motion call, the mediator met with the attorneys for the parties in the court's jury room at the suggestion of Mrs. Nicols' counsel. (App. G, G-4) (T: 5/18/88: 3) A further attempt was made to resolve the differences still remaining between them. After several hours of further negotiations, the session was terminated without the parties having reached any agreement. Later, when the mediator testified at the hearings held in August, 1988, he could not remember whether certain items had been discussed in May or February. (App. G, G-36) (T: 8/4/88: 188-9, 203)

Next, the court ordered the parties to submit their respective proposed judgments to the mediator. He was directed to review them both and submit a further report and recommendation to the court. The Petitioner, without waiving any of his rights, submitted to this procedure in an attempt to accommodate the court and the settlement process. (App. G, G-43) (T: 8/5/88: 319)

On or about June 22, 1988, the mediator filed a supplemental report. (App. G, G-7) (T: 8/3/88) He determined that neither party's proposed judgment was an accurate reflection of the tentative agreement reached on February 27, 1988. Rather, he noted that both proposals seemed to embody further post-mediation "agreements." He did, however, recommend adoption of Mrs. Nicols' version.

Shortly thereafter, counsel for Respondent renoticed her version of a proposed Judgment and QDRO for entry. The matter came before the court for a hearing on August 3, 1988. (App. G, G-7) (T: 8/3/88: 3) The hearings continued intermittently between August 3 and August 12, 1988.

At the hearings, testimony was taken from both parties and from the mediator. The court went over Mrs. Nicols' proposed judgment and compared it to the one Petitioner had submitted at the court's direction. In some cases, the judge proceeded through the documents line by line.

The court initially stated that the purpose of this procedure was to "work through and find out what you are at

least agreeing to between the two proposed judgments and then find out what we are disagreeing to so we can get this matter over and done with." (App. G, G-7) (T: 8/3/88: 20) Later he reiterated that "all we're trying to do is test the various positions of the parties by exploring them, and that way I can get a better feel for where we're going." (App. G, G-34) (T: 8/3/88: 125)

The court specifically stated it was "not trying to rebuild [language] . . . *nor am I entering a judgment.* I'm trying to be practical and arrive at a conclusion to this thing." (App. G, G-39) (T: 8/4/88: 235)

While Petitioner participated in the proceeding, he did so only at the express direction of the court. Through counsel, he repeatedly asserted that he had a continuing objection to this unauthorized re-mediation procedure. (App. G, G-9, G-45–G-46, G-47) (T: 8/3/88: 50; T: 8/10/88: 345-7, 358, 364; T: 8/12/88: 3) The court "agreed" and acknowledged his continuing objection and non-waiver. (App. G, G-9, G-46) (T: 8/3/88: 50; T: 8/10/88: 346-7)

In fact, as part of its ruling on Respondent's motion, the court explicitly recognized that the parties could not agree. (App. G, G-44) (T: 8/5/88: 333) It indicated that it was only adjudicating questions concerning the meaning of the language of the Feldstein Memorandum and "polishing" it by modifying some of its terms. (App. G, G-43, G-44) (T: 8/5/88: 328, 333)

The court also acknowledged that the Feldstein Memorandum was only a memo that contemplated agreement by counsel on language and stated that Petitioner "may be right" with respect to his argument that there was no contract between the parties. The court refused, however, to make a ruling in that regard. (App. G, G-44) (T: 8/5/88: 329) The court also took the startling position that although the matter had been mediated by its order, there really was not a mediation "as such." (App. G, G-44) (T: 8/5/88: 330)

At the conclusion of the hearings, the court directed Mrs. Nicols' counsel to submit a new judgment and QDRO based on the "findings" he had made as a result of the "exploring and testing" process referred to above. This was done over the strenuous objection of Petitioner who had never withdrawn his answer nor waived trial as part of this "exploration" process.

While the Petitioner did not explicitly articulate his due process objections during these proceedings, he did make the series of objections noted above to the court's actions. As argued more fully below, these objections sufficed to alert the trial judge to Petitioner's reliance on due process principles. Explicit reliance on the fourteenth amendment and on due process was articulated in Petitioner's brief in support of his appeal as of right to the Michigan Court of Appeals. Appellant's Brief at 17, 35, *Nicols* v *Nicols*, Michigan Court of Appeals, Case No. 111262.

Finally, the court — though it had stated it was not making an agreement or judgment — did just that. On August 12, 1988, it entered a "Default Judgment" different from anything proposed by either Mrs. Nicols or the Petitioner.

Based largely on the draconian terms embodied in the supposed "Judgment," Mr. Nicols has been forced to file a petition for relief pursuant to Chapter 11 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, in the United States Bankruptcy Court for the Eastern District of Michigan, Southern Division. That case is presently pending before the Honorable Ray Reynolds Graves.

C. THE "DEFAULT JUDGMENT"

As noted above, the patchwork "Default Judgment" entered over Petitioner's objection *differs* from both the draft submitted by Mrs. Nicols and the draft submitted by Mr. Nicols. In addition, its terms differ from those of the Feldstein Memorandum in a number of important ways:

(a) It is labeled a "Default" Judgment of divorce;

(b) The consent of the Petitioner is required regarding elective medical procedures for the minor children. (App. D, ¶ 8) The Feldstein Memorandum is silent on this point. (App. G, G-9) (T: 8/3/88: 41);

(c) It provides for an alternating right to claim the children as dependents for income tax purposes with certain further contingent provisions. (App. D, ¶ 9) The Feldstein Memorandum is silent on this point. (App. G, G-9) (T: 8/3/88: 43);

(d) The choice of the school that each minor child will attend is specifically made a joint decision. (App. D, ¶ 10) The Feldstein Memorandum is silent on this point. (App. G, G-10–G-11) (T: 8/3/88: 51-2);

(e) The Petitioner is allowed specific items of furniture and miscellaneous personal property not previously given to him. (App. D, ¶ 16B) (App. G, G-12–G-30) (T: 8/3/88: 85-110);

(f) It allows more than $10,000 worth of credits against the Petitioner's obligation to make an initial property settlement payment of $50,000. (App. D, ¶ 16C(1)) The Feldstein Memorandum is silent as to these credit items. (App. G, G-29, G-30–G-33) (T: 8/3/88: 109-10, 113-116);

(g) The right of the Petitioner to prepay an additional $1,000,000 property settlement obligation "without penalty" is made explicit. (App. D, ¶ 16D) The Feldstein Memorandum is silent on this point. (App. G, G-38) (T: 8/4/88: 210);

(h) It specifies a January 31, 1988 date for the valuation of an interest awarded to Mrs. Nicols in Mr. Nicols' Profit Sharing Plan rather than accepting her proposal for a valuation based on the date of the entry of a judgment. (App. D, ¶ 16F); the Feldstein Memorandum is silent as to the valuation date. (App. G, G-38) (T: 8/4/88: 214); and

(i) It modifies Mrs. Nicols' proposed provision for the appointment of a receiver to liquidate certain real property as part of a security arrangement as to some settlement payments by specifying that such a receiver need employ "ordinary marketing activities" in connection with such a sale and by providing that the Petitioner can terminate the receivership prior to closing by making a series of specified payments. (App. D, ¶ 31) The Feldstein Memorandum does not specify this. (App. G, G-39) (T: 8/4/88: 245)

In addition to the discrepancies noted above, the "Judgment" also *differs* from the alternative judgment submitted by the Petitioner previously at the request of the court, in a number of additional ways:

(a) It deletes visitation provisions relating to a mid-week overnight stay as well as those delineating specific holiday and birthday visits. (App. D, ¶ 5) The Feldstein Memorandum is silent on this point. (App. G, G-8) (T: 8/3/88: 26-7);

(b) It provides for reopening of the question of alimony to Mrs. Nicols upon "default" — as opposed to "*material* default" — in the payment of certain property settlement obligations. (App. D, ¶ 12) The Feldstein Memorandum is silent on this point. (App. G, G-11–G-12) (T: 8/3/88: 62-3);

(c) The Petitioner's credit for taxes which he paid on behalf of his wife is reduced from $9,000 to $5,151.88 and a $13,000 credit for assumption of the outstanding balance on a loan taken to pay for the marital furniture is deleted. (App. D, ¶ 16C) The Feldstein Memorandum is silent as to these credits. (App. G, G-29, G-30–G-33) (T: 8/3/88: 109-10, 113-16);

(d) It rejects Petitioner's provisions providing for a discount on a $1,000,000 property payment based on tax effect and providing for interest to run only on

the amount of the monthly payment. (App. D, ¶ 16D) The Feldstein Memorandum is silent as to the first and consistent with the second;

(e) In a provision relating to the payoff of an accelerated balance as to certain property settlement obligations the term "Present value" is tied to "then prevailing interest rate." (App. D, ¶ 16D) The Feldstein Memorandum is silent on this point;

(f) The valuation date for Mrs. Nicols' interest in Mr. Nicols' Profit Sharing Plan is set forth as January 31, 1988. (App. D, ¶ 16F) The Feldstein Memorandum is silent as to the valuation date;

(g) It imposes responsibility upon the Petitioner for a $13,000 bank installment note. (App. D, ¶ 18) The Feldstein Memorandum is silent as to this point. (App. G, G-33) (T: 8/3/88: 120); and

(h) The provision relating to the appointment of a receiver for purposes of accounting for certain bonds and unregistered securities includes "repayment of debt" as an item of the accounting and deletes other language proposed by the Petitioner. (App. D, ¶ 19) The Feldstein Memorandum is silent on this point. (App. G, G-34) (T: 8/4/88: 178);

As also noted earlier, neither party's proposal contradicted the outline embodied in the Feldstein Memorandum. Each proposal was simply a detailed articulation of that party's respective understanding of what the terms of a prospective "agreement" should be. Nonetheless, the trial court took it upon itself to create and approve a third version that differed from everyone's unreconciled understanding of the purported agreement. This was done despite that court's statement at the beginning of the hearings that all that the participants were doing was "testing and exploring" positions and that it would not make a judgment. (App. G, G-34) (T: 8/3/88: 125)

Despite these facts, the Michigan Court of Appeals concluded that the parties had entered into a binding agreement at the time of the mediation. The "Default Judgment," in the view of the state appellate panel, merely implemented the supposed agreement by "setting the form" of the judgment.

The Petitioner requested that the Michigan Court of Appeals reconsider its factual assumption that the trial judge had "found that the parties had agreed to a settlement of the case and that a sufficient 'meeting of the minds' had occurred." *Per curiam* Opinion of the Court of Appeals, p. 2 (App. C, C-3)

Petitioner's Motion For Rehearing in the Michigan Court of Appeals, incorporated here as Appendix I, noted that a fair overall reading of the evidentiary hearing of August 5, 1988 supported the conclusion that the trial court did *not* find that the parties had agreed to a settlement prior to that hearing and, in fact, the parties could not agree. The motion was denied. The Michigan Supreme Court denied leave to appeal without opinion, thus allowing the *per curiam* decision to stand.

Petitioner now seeks issuance of a writ of certiorari to review the decision rendered below.

REASONS FOR GRANTING THE WRIT

I.

THE SUBSTANTIAL FEDERAL QUESTIONS CREATED BY THE STATE TRIAL COURT'S VIOLATION OF THE PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS HAVE BEEN SUFFICIENTLY PRESERVED TO PROPERLY INVOKE THE JURISDICTION OF THIS COURT.

The Petitioner recognizes at the outset that his invocation of this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a) requires that a substantial federal question have either been raised before, or resolved by, the state courts

below. *See Hill* v *California*, 401 U.S. 797, 805, 91 S.Ct. 1106, 28 L.Ed. 2d 484 (1971); *McGoldrick* v *Compagnie Générale*, 309 U.S. 430, 434, 60 S.Ct. 670, 84 L.Ed. 849 (1940). For the reasons more fully set out below, there can be little question that the fourteenth amendment due process claims discussed herein articulate substantial federal issues. Rather, the focus of the present inquiry is whether those issues were adequately raised below.

As this Court has recognized, "whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question." *Street* v *New York*, 394 U.S. 576, 583, 89 S.Ct. 1354, 22 L.Ed. 2d 572 (1969). That federal question, in turn, has two components. The first is whether the federal question was adequately framed. And the second is whether it was properly and timely raised.

The leading commentators on practice before this Court have summarized the standards to be applied to the framing of federal questions in this context as follows:

> In framing the federal question for presentation to the state court, the litigant is not bound to follow any particular form of words or phrases. It is essential only that he bring the federal claim and the grounds therefor to the state court's attention with fair precision. And "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant* v *Zimmerman*, 278 U.S. 63, 67 (1928). The Court has cited that *Zimmerman* statement in holding that a specific Eighth Amendment question was properly before it in a capital case, where the question had been presented to the state court in general rather than precise terms, on the stated premise that: "Our jurisdiction does not depend on citation to book and verse." *Eddings* v *Oklahoma*, 455 U.S. 104, 113-14 n. 9 (1982). (Footnote deleted)

R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice*, 6th ed., § 3.20, p. 146.

In a procedural context closely analogous to that presented in the instant case, this Court appears to have applied the concepts articulated above in concluding that a trial-level objection which invoked the "fundamental principle of judicial fair play" sufficiently framed a federal question because that objection "should have sufficed to alert the trial judge to petitioner's reliance on due process principles." *Taylor* v *Kentucky*, 436 U.S. 478, 482 n. 10, 98 S.Ct. 1930, 56 L.Ed. 2d 468 (1978). As here, explicit reliance on the fourteenth amendment was not articulated until the filing of the Petitioner's brief in the intermediate state appellate court. The Kentucky Supreme Court denied discretionary review. This Court ultimately granted certiorari, reversed and remanded.

Like Mr. Taylor, the Petitioner in this case made immediate and continuing objections to the trial court's conduct of the proceedings. (App. G, G-9, G-45 – G-46, G-46, G-47) (T: 8/3/88: 50; T: 8/10/88: 345-7, 358, 364; T: 8/12/88: 3) While no explicit reference was made to "due process," this continuing series of objections should have sufficed, as in *Taylor*, *supra*, to alert the trial judge that due process protections were being invoked.

Also like the petitioner in *Taylor*, Mr. Nicols made his reliance on due process concepts explicit when he took his appeal of right to the state intermediate appellate court. *See, e.g.*: Appellant's Brief at 17, *Nicols* v *Nicols*, Michigan Court of Appeals, Case No. 111262:

> Under these circumstances a default judgment was not properly entered. Letting the judgment stand would not only violate applicable court rules but would constitute a violation of Defendant-Appellant's constitutional rights to due process. US Const, Am XIV; Const 1963, Art I, Section 17. The "Default Judgment" should be vacated and the matter remanded for a trial on the merits.

Given the striking similarity between this case and *Taylor*, this Court should conclude that the record herein, taken as a whole, shows both expressly and "by clear intendment" that the federal due process question was adequately framed before the state court. *New York ex rel Bryant* v *Zimmerman*, 278 U.S. 63, 67, 49 S.Ct. 61, 73 L.Ed. 184 (1928). *See also: Webb's Fabulous Pharmacies, Inc.* v *Beckwith*, 449 U.S. 155, 159 n. 5, 101 S.Ct. 446, 66 L.Ed. 2d 358 (1980).

Once it has been established that a federal question has been properly framed, the second, and somewhat interrelated, inquiry is whether that question was properly and timely raised. Petitioner recognizes that as a general rule, federal questions should initially be raised in the trial court. Where, as here, however, the fundamental fairness of the entire trial level proceeding is being questioned, this Court has recognized that the federal question may be raised *after* that proceeding has been completed and the cumulative effect of the trial court's actions can be evaluated. *See Chambers* v *Mississippi*, 410 U.S. 284, 290-91 n. 3, 93 S.Ct. 1038, 35 L.Ed. 2d 297 (1973). As in *Chambers, supra*, the Petitioner here raised a series of non-constitutional objections during the trial-level proceedings and then raised his due process arguments after the conclusion of those proceedings. Given the circumstances of this case, and the trial court's continuing assurances that it wasn't going to be "entering a judgment," it is respectfully submitted that there was no way that the due process argument could have been articulated in this case until then. (App. G, G-39) (T: 8/4/88: 235) Once the issue was more fully articulated in Petitioner's brief to the Michigan Court of Appeals, it was reasserted in his brief in support of his application for discretionary review by the Michigan Supreme Court, thus preserving it for review by this Court.

For the reasons briefly set out above, this Court should conclude that the federal due process questions raised herein have been sufficiently preserved to invoke the jurisdiction of this Court.

II.

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS PROPERTY INTERESTS IN HIS MARITAL ESTATE WERE DISTRIBUTED WITHOUT HIS CONSENT AND IN VIOLATION OF THE PROCEDURAL SAFEGUARDS AFFORDED BY THE MICHIGAN COURT RULES.

The Fourteenth Amendment to the Constitution of the United States provides that no State shall deprive any person of property without due process of law. U.S. CONST., amend. XIV. As a party to a contract of marriage, the Petitioner has a constitutionally-protected property interest in the marital estate when the marriage ends in divorce. Thus, when the court below entered a judgment of divorce which included a "mediated" settlement agreement to which the Petitioner had not consented, that judicial distribution of his interests in the marital estate deprived him of that property interest without due process. In addition, the state trial court violated due process standards by arbitrarily and capriciously depriving the Petitioner of a non-jury trial on the distribution of the property of the marital estate with full notice and appropriate opportunity to prepare for such a trial.

The threshold issue presented is whether the Respondent has a sufficient property interest to merit the protection of the fourteenth amendment. The legal standards which apply to this issue were succinctly summarized in *Curtis Ambulance* v *Shawnee County Board of County Commissioners*, 811 F.2d 1371, 1375-76 (10th Cir. 1987):

> To prevail on its due process claim [the respondent] must prove that it had a definite liberty or property interest and that such interest was, under color of state law, abridged without appropriate process. See *Board of Regents* v *Roth*, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Casias* v *City of Raton*, 738 F.2d 392, 394 (10th Cir. 1984); *Vinyard* v *King*, 728 F.2d 428, 430 (10th Cir. 1984). The process requirement necessary to satisfy fourteenth amendment procedural due process comes

> into play only after plaintiff has shown that it has a property or liberty interest. *Vinyard*, 728 F.2d at 430 n. 5 (citing *Roth*, 408 U.S. at 569-70, 92 S.Ct. at 2705).

The *Curtis Ambulance* court then went on to delineate the factors which come into play in determining whether a particular property interest is worthy of due process protection:

> To establish a property interest in a particular benefit, one must have a "legitimate claim of entitlement" to it. *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709. "[A]n abstract need or desire for it" or a "unilateral expectation" is insufficient. Id; see also *Logan* v *Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). Whether such claim of entitlement exists, and the sufficiency thereof, is determined "by reference to state law." *Bishop* v *Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077, 48 L.Ed.2d 684 (1976). However, while the typical claim of entitlement is based upon "specific statutory or contractual provisions," it need not be. *Casias*, 738 F.2d at 394. Rather, "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry* v *Sindermann*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972).

In the instant case, the Petitioner's claim is firmly grounded in his real and personal property interest in the marital estate. Michigan law has long recognized that such property rights are at the core of the body of interests to be accorded due process protection. *See Zabowski* v *Loerch*, 255 Mich. 125, 127, 237 N.W. 386 (1931); *Rassmer* v *Federal Collateral Society*, 299 Mich. 206, 213-214, 30 N.W. 45 (1941).

Where, as here, a significant protected property interest has been established, the fourteenth amendment requires that such an interest not be abridged in the absence of notice and an opportunity to be heard in a meaningful manner. *See Cleveland Bd. of Educ.* v *Loudermill*, 470 U.S. 532, 105 S.Ct. 1987, 84 L.Ed. 2d 494 (1985).

The calculus for discerning the level of due process required is complex and largely depends on the right affected. Generally, a pre-deprivation hearing is required, but the formality and procedural requisites for such a hearing can vary, depending on the importance of the interests involved and the nature of the subsequent proceedings. *Boddie* v *Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971). Other considerations that must be factored into the calculus include the importance of the private interest involved, the length or finality of the deprivation, the likelihood of governmental error and the fiscal and administrative burdens on the government that additional or substitute procedural requirements would entail. *Mathews* v *Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 903, 47 L.Ed. 2d 18 (1976); *Logan* v *Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 1157, 71 L.Ed. 2d 265 (1982).

In the case at bar, the Petitioner's interest in a fair distribution of the marital estate is a strong one. Virtually millions of dollars that he earned, without any education beyond high school, have been handed over to the Respondent. The trial court's action has permanently deprived him of a substantial part of his property. And, for the reasons articulated more fully below, there is a high likelihood of governmental error here.

The courts admittedly have an interest in the expeditious resolution of divorce and custody matters. But just as the court's interest in resolving probate matters did not outweigh the constitutional requirement of actual notice found in *Tulsa Collection Services* v *Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 2d 565 (1988), an interest in decisional alacrity here does not outweigh the Petitioner's right to a fair mediation and a full and properly noticed bench

trial in accordance with Michigan's statutes and court rules. In fact, the amount of judicial time spent in the August, 1988 hearing was not substantially less than would have been required for a properly noticed bench trial.

Furthermore, the Michigan Court Rules have established a high standard of due process in regard to "agreements" reached during court proceedings. MCR 2.507(H) states:

> An agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by the party's attorney.

See also Metropolitan Life Insurance v *Goolsby*, 165 Mich. App. 126, 128-129, 418 N.W.2d 700 (1987) (confirming that oral settlement agreements are unenforceable unless made in open court).

Here, it is undisputed that no agreement was made *in open court*. Rather, the "Default Judgment" apparently seeks to enforce the trial court's conception of the terms of an oral "agreement" allegedly formed during the mediation process.

The Petitioner has consistently denied the existence of any agreement between the parties based on a lack of a "meeting of the minds." There was no writing subscribed by the Petitioner or his counsel. No agreement was put on the record in open court and consented to by both parties. Contrary to the arguments put forward below by Respondent, a careful reading of the transcript of the hearing held on March 7, 1988, clearly reveals that Petitioner did *not* stipulate to the entry of the Feldstein Memorandum at that time as a definitive settlement agreement. Rather, his counsel indicated to the trial court that it was his understanding that the parties would later enter into a settlement agreement separate from the judgment. (App. G, G-3)

The trial court acknowledged that it was imposing an agreement where none had been found, yet simultaneously

protested that it was "not making an agreement." (App. G, G-44) (T: 8/5/88: 329-30, 333) These protests notwithstanding, it is clear that the court arbitrarily fashioned a "settlement agreement" for the parties where none previously existed and imposed it on the Petitioner by means of the entry of a "Default Judgment" without regard to his procedural due process rights to a proper mediation and properly noticed bench trial. Futhermore, even assuming, *arguendo*, there was such a "stipulated agreement," it is clear from the subsequent actions of Petitioner that any purported stipulation was effectively revoked. *Norton Shores* v *Carr*, 59 Mich. App. 561, 229 N.W.2d 848 (1975); *Van Wagoner* v *Van Wagoner*, 131 Mich. App. 204, 212-213, 346 N.W.2d 77 (1983).

A default judgment in a Michigan domestic relations matter may only be entered in specific circumstances. MCR 3.208(B) governs the entry of such judgments. (*See* App. J) However, as stated in 3.208(B)(1), the broader requirements which apply to default judgments in general found in MCR 2.603, must still be met. MCR 2.603(A)(1) reads:

> Rule 2.603 Default and Default Judgment
>
> (A) Entry; Notice; Effect.
>
> (1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

In this case, there was never a "default" upon which a Default Judgment could be based.

Petitioner's answer was duly filed and was never withdrawn. (App. E, D/E: 4/5/88) The Petitioner continued to fully and vigorously defend against the action. While some proofs were taken on March 7, 1988, it is manifest that no judgment was entered on that date. The trial court indicated from the bench that it was satisfied with the statu-

tory proofs presented and *would* grant an absolute judgment of divorce, but made no ruling or indication regarding custody or property issues. Moreover, Mrs. Nicols' counsel interposed and indicated that it was the understanding of the parties that the dissolution of the marriage would *not* take place until the entry of a final order. (App. G, G-3–G-4) (T: 3/7/88: 7-8) The court agreed that it had nothing before it at that time upon which to make an immediate "pronouncement." (App. G, G-3–G-4) (T: 3/7/88: 7-8) No "pronouncement" was made and no order or judgment was entered.

Neither party asserted that the hearings of August 3-12, 1988 were a trial. The "Default Judgment" was entered upon Plaintiff's Motion for Presentment of Judgment and QDRO over Defendant's strenuous objections. No consent was ever given. This was acknowledged by the trial court. (App. G, G-46) (T: 8/10/88: 346) Thus, there was no trial upon which to base a judgment and no consent obtained.

This series of "forced errors," culminating in the trial court's formation of the "agreement," and the imposition of the Default Judgment without a trial, clearly demonstrates that minimal standards of procedural due process were not met here. Furthermore, even if it were assumed such minimal standards were achieved, a number of federal decisions have indicated that *substantive* due process rights are violated if procedural safeguards beyond the minimum are promised by the state but subsequently not provided.

For example, in *Bignall* v *North Idaho College*, 538 F.2d 243 (9th Cir. 1976), a college discharged a teacher without providing her with the adequate notice required by its own procedural regulations. The purpose of such notice was to allow the teacher to marshal a case against her employer. Though a hearing ultimately took place, the court noted that "since the lack of notice as to the real reason [the teacher] was terminated rendered the procedure as to that point inadequate, the [Plaintiff] would not have received due process by continuing the hearing." *Bignall*, *supra*, at

248. The court recognized that where a property interest is taken in accordance with constitutional procedural due process there may nevertheless be a denial of substantive due process if, in taking the property interest, the state refuses to follow additional procedural protections it has promised to afford. While the *Bignall* court ultimately ruled for the Defendants, that decision was based on the finding that there was a *de novo* evidentiary proceeding in U.S. District Court in which the discharged teacher *was* afforded the complete panoply of procedural rights to which she was entitled. *Id.*

Other federal decisions have found similar substantive due process violations where some procedural rights may have been provided, yet other promised procedures were denied, so that the constitutional minimum itself was denied, or an independent constitutional deprivation occurred. *See Villegas* v *INS*, 745 F.2d 950, 951 (5th Cir. 1984); *Raley* v *Ohio*, 360 U.S. 423, 437-38, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959); and *Cox* v *Louisiana*, 379 U.S. 559, 569-71, 85 S.Ct. 476, 13 L.Ed. 2d 487 (1965).

Like the state actors in the above cases, the trial court in the instant case provided a hearing and a few other procedural amenities, but failed to provide the additional procedural protections that Michigan has promised to afford by virtue of the standards set out in its court rules and statutes. Just as the individuals in *Cox*, *supra*, relied on the state's promise as to where it would be proper to demonstrate, the Petitioner expected a full and fair mediation and trial in reliance on state law and the court's instructions. He was also assured a right to a settlement agreement based on the Feldstein Memorandum, not a judicial pronouncement taken from the whole cloth of a "super-mediation" performed in violation of Michigan law.

The trial court violated the Petitioner's rights to both procedural and substantive due process by its failure to enforce Michigan law as to mediations, trials, contract interpretation, and default judgments. To permit this judg-

ment to stand would abrogate the Petitioner's right under the fourteenth amendment to be not deprived of his property without due process of law.

III.

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS PROPERTY INTERESTS IN HIS MARITAL ESTATE WERE DISTRIBUTED IN VIOLATION OF THE PROTECTIONS PROVIDED BY THE MICHIGAN STATUTE OF FRAUDS ENACTMENTS.

In addition to the procedural protections accorded to the Petitioner by the court rules discussed in the preceding section of this petition, Michigan extends protections to its citizens in the form of several codifications and statutory extensions of the substantive safeguards of the original English statute of frauds. 29 Charles II (1676), Ch. 3.

MCLA 566.132; MSA 26.922 provides that in Michigan certain agreements are *void* unless reduced to a writing signed by the person against whom enforcement is sought. It states, in relevant part:

> In the following cases an agreement, contract or promise shall be void, unless that agreement, contract, or promise, or a note or memorandum thereof is in writing and signed by the party to be charged therewith, or by a person authorized by him:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making thereof.
>
> (b) A special promise to answer for the debt, default, or misdoings of another person . . .

See also Aetna Mort. Co. v *Dembs*, 13 Mich. App. 686, 691, 164 N.W.2d 771 (1968) (citing with approval secondary authority that such a statute is an extension of the statute of frauds and a valid exercise of police power); *Nixon* v *Colotex*, 693 F. Supp. 547 (W.D. Mich. 1988).

Similarly, agreements concerning interests in real property are generally void under Michigan law unless reduced to writing. MCLA 566.108; MSA 26.908. *See also Scott* v *Bush*, 26 Mich. 418, 420 (1873) (a contract void under the Michigan statute of frauds is a mere nullity and cannot be used for any purpose whatsoever).

Therefore, even assuming *arguendo* that a true agreement had been reached between the parties at mediation, any such agreement would have been *void ab initio* pursuant to the authorities set out above. The terms of the purported agreement as embodied in the Feldstein Memorandum were clearly within the purview of the statute of frauds. The Memorandum, for example, provided for child support to be paid until the parties' minor children reached eighteen (18) years of age or graduated from high school, whichever occurred later. It further provided that each of the parties would indemnify the other for certain specified liabilities. Neither child of the parties would be eighteen (18) nor graduate from high school within one (1) year of the agreement. (App. E, D/E: 8/12/88) Thus, pursuant to the statutory authorities noted above, any purported agreement between the parties containing these terms is unenforceable. The Default Judgment based upon such a void "agreement" is itself void and created by such a fundamentally unfair application of state power as to clearly violate Petitioner's constitutional right to substantive due process.

As noted in the preceding section of this petition, even where a property interest is taken in apparent conformity with the requirements of procedural due process, if the state refuses to utilize the additional protections it has created, such refusal may itself constitute a denial of substantive due process. *See Bignall*, *Villegas*, *Raley* and *Cox*, *supra*. These decisions admittedly focus on state failure to follow additional *procedural* protections which were promised to be provided. Nonetheless, the principles underlying the cases should be persuasive here whether the trial court's failure to extend the additional protections afforded by the statute of frauds is viewed as procedural or substan-

tive. If the trial court's responsibility to refuse to enforce the alleged settlement agreement because of its parol nature is viewed as procedural, then based on the authorities above its failure to fulfill those responsibilities directly constituted a *substantive* due process violation, even in the face of procedural offerings such as an evidentiary hearing.

Conversely, if the additional protections extended by the statute of frauds are construed to be purely substantive, the trial court's failure to afford Petitioner the protections of the statute was such a gross and obvious error as to constitute arbitrary and capricious action constituting a distinct, free-standing substantive due process violation. *Roberts* v *New York*, 295 U.S. 264, 55 S.Ct. 689, 79 L.Ed. 1429 (1935).

These conclusions would not be altered even if this Court were to hold that minimal procedural due process requirements were met in this case. Procedural due process has been said to permit a state to take the property, liberty, or even life, of a citizen as long as appropriate procedures and procedural remedies are provided. Substantive due process, on the other hand, imposes limits on state action irrespective of what procedural safeguards are provided. *Monroe* v *Pope*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Furthermore, such claims need not be grounded on the violation of a specific constitutional guaranty. *Porter* v *City of Detroit*, 639 F. Supp. 589, 593 (E.D. Mich. 1983). Rather substantive due process generally requires that state action which deprives an individual of his property must have a rational basis, that is, the reason for the property deprivation must not be so inadequate as to be arbitrary. T. Nowak, R. Rotunda & T. Young, *Constitutional Law*, pp. 443, 448-49 (2d ed. 1983). *See also Wolff* v *McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed. 2d 935 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government").

Petitioner recognizes, of course, that not every failure to properly apply state law rises to the level of constitutional

infringement. Here, however, the state judge's complete and intentional failure to recognize the nullifying effect of the statute of frauds on the purported "agreement" of the parties was so arbitrary as to now require federal due process protection. As Chief Justice Rehnquist noted in *Daniels* v *Williams*, 474 U.S. 327, 331, 88 L.Ed. 2d 662, 106 S.Ct. 662 (1986):

> . . . By requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them . . . it serves to prevent governmental power from being "used for purposes of oppression" . . . (citations deleted)

To effectuate the policy set out above, this Court should grant certiorari and reverse

IV.

PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED WHEN HIS PROPERTY INTERESTS IN HIS MARITAL ESTATE WERE DISTRIBUTED BY JUDICIAL ACTIONS WHICH WERE CLEARLY ARBITRARY AND CAPRICIOUS.

A. The Trial Court's Adjudication Was Arbitrary And Capricious.

As noted earlier, this Court has long subscribed to the proposition that the "touchstone of due process" is the protection of individual rights against arbitrary governmental action. *Wolff*, *supra*, at 418 U.S. 558. Strictly speaking, however, "pure arbitrariness" in the sense of manifest prejudice does not have to be demonstrated. Rather, as this Court recognized in *Roberts* v *New York*, *supra*, gross and obvious error coming close to the boundary of arbitrary action is sufficient to establish a substantive due process violation.

More recently, the court in *Bossetta-Goodman* v *Data-Com Systems Corp.*, 644 F. Supp. 354 (E.D. La. 1986) stated that a guaranty of substantive due process insures that state action which deprives the person of property must have a rational basis; the reason for the deprivation may not be so inadequate as to be arbitrary. In the instant case, the record is replete with indications of the court's arbitrary and capricious approach to this matter. The following excerpts from the record typify the trial court's eagerness to clear its docket and its failure to consider the case law cited by both parties:

> I intend this will be the first case on my non-jury term for trial. So I'd suggest that you — I talked to Mr. Feldstein who appeared before me the other day. He said you still were playing around with this mediation. Whether the mediation is done or not, we will start the trial on February the 15th at nine o'clock. (App. G, G-1) (T: 12/23/87: 9)
>
> * * *
>
> Can we work through and find out what you are at least agreeing to between the two proposed judgments and then find out what we are disagreeing to so we can get this matter over and done with? (App. G, G-7) (T: 8/3/88: 20)
>
> * * *
>
> And I've made that, I thought, quite clear that is the only issue to be resolved and we're waiting for Mr. Feldstein's interpretation in relation to that mediation which this Court will ultimately resolve. That's all I'm going to do. In all other respects I consider the parties and would order the parties are to comply with the terms of that judgment that was entered in relation to this matter. No further discussion in connection with it. Thank you.

Mr. Potts [for Petitioner]: Your Honor —
The Court: That's it.
Mr. Potts: — with all respect, and the Court knows I respect this Court, the Court is saying that I may not present our position, I mean our —
The Court: Absolutely not. I already told Mr. Carson that. And I explained to you why. And it makes perfect logical sense. Once the parties begin to realize that in fact there's a termination as far as this marriage is concerned and they have certain rights that they have acquired . . .
Mr. Potts: Your Honor —
The Court: I'm not going to discuss it, Mr. Potts.
Mr. Potts: Your Honor, just may I make a statement?
The Court: You want to read my article in *Laches* about making statements after the Court has ruled?
Mr. Potts: No, your Honor. I read it.
The Court: Thank you.
Mr. Potts: And appreciate the —
The Court: Thank you.
Mr. Potts: — opportunity to be present.
(T: 6/22/88: 3-5)

* * *

The Court: Now, the Court hasn't gone through and analyzed each case. I think that each case can be cited for the propositions they were cited for. I think the facts of this case will determine it. (App. G, G-45) (T: 8/5/88: 338)

"It is not the policy of the law to choose expediency over due process when it should be afforded." *State* v *King*, 82 Wis. 2d 124, 262 N.W.2d 80 (1978). As illustrated by the above passages and the actions detailed earlier herein, the trial court chose expediency. Therefore, the results of such arbitrary and capricious action cannot stand.

B. Even If The Petitioner's Procedural Due Process Rights Were Met, His Substantive Due Process Rights Were Violated.

The three requirements for a legitimate substantive due process claim are: (1) that the actions or omissions of the state actor (here the trial court) were under color of state law; (2) that the claim fell within the definition of property and (3) that the loss amounted to a deprivation of that property. *Bates* v *New York City Transit Authority*, 721 F. Supp. 1577 (E.D.N.Y. 1989). The hallmark of a protected property interest is an individual entitlement grounded in law which cannot be removed except for cause. *Callaway* v *Block*, 763 F.2d 1283 (11th Cir. 1985).

The Petitioner's success in business created virtually all the assets of the marital estate, the property at issue here. The courts of Michigan stripped the Petitioner of these assets to such an extent that he had to file for bankruptcy. This deprivation, albeit capricious and arbitrary, was done under color of Michigan law.

Even if the argument were to be made that the Petitioner received a fair hearing and the opportunity to appeal his case, this does not eliminate the deprivation of his substantive due process rights at the trial court level. When a state actor violates such a right, the violation is complete at the time of the deprivation, regardless of state post-deprivation procedures that might be available for repairing the wrong. *Holland* v *Breen*, 623 F. Supp. 284 (D. Mass. 1985). Furthermore, neither the Michigan Supreme Court nor the Michigan Court of Appeals addressed the due process issue which was raised by Petitioner before both courts.

The state's power to legislate, adjudicate and administer all aspects of family law, including determinations of custodial and visitational rights, is subject to scrutiny by the federal judiciary and is within the reach of the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment. *Wise* v *Bravo*, 666 F.2d 1328 (10th Cir. 1981) citing:

In re Burrus, 136 U.S. 586, 10 S.Ct. 850, 34 L.Ed. 500 (1890); *Schleiffer* v *Meyers*, 644 F.2d 656 (7th Cir. 1981), U.S. app. pndg.: *Crouch* v *Crouch*, 566 F.2d 486 (5th Cir. 1978); *Huynh Thi Anh* v *Levi*, 586 F.2d 625 (6th Cir. 1978); *Solomon* v *Solomon*, 516 F.2d 1018 (3d Cir. 1975); *Leonhard* v *Mitchell*, 473 F.2d 709 (2d Cir. 1973), *cert. denied*, 412 U.S. 949, 93 S.Ct. 3001, 37 L.Ed. 2d 1002 (1973).

In scrutinizing this Petition for Certiorari, it is worth remembering this Court's recent characterization of the role of substantive due process. By barring certain government actions such as the property deprivation in the instant case, regardless of the content of the procedures used to implement these actions, the due process clause serves to prevent governmental power from being used for purposes of oppression. *Daniels*, *supra*. Therefore, this Court should conclude that the trial court's treatment of the Petitioner and his rights — when taken as a whole — was so arbitrary and capricious as to violate his constitutional right to substantive due process.

CONCLUSION

For the reasons articulated above, this Court should conclude that state trial court action below violated Petitioner's fourteenth amendment rights to both procedural and substantive due process and issue a writ of certiorari to the Michigan Supreme Court.

Respectfully submitted,

CARSON FISCHER AND POTTS

By: /s/ ROBERT M. CARSON
Counsel of Record
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300 East Maple Road, Third Floor
Birmingham, Michigan 48009
(313) 644-4840

Dated: April 25, 1991

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER

(State of Michigan — Supreme Court)

(Entered January 28, 1991)

(LYNNE J. NICOLS, Plaintiff-Appellee, v ROBERT T. NICOLS, Defendant-Appellant — SC: 88339; COA: 111262; LC: 85-290611-DM)

Michael F. Cavanagh, Chief Justice; Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices

On order of the Court, the motion for reconsideration of this Court's order of October 30, 1990 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/ Corbin R. Davis,
Clerk

January 28, 1991

APPENDIX B

ORDER

(State of Michigan — Supreme Court)

(Entered October 30, 1990)

(LYNNE J. NICOLS, Plaintiff-Appellee, v ROBERT T. NICOLS, Defendant-Appellant — SC: 88339; COA: 111262; LC: 85-290611-DM)

Dorothy Comstock Riley, Chief Justice; Charles L. Levin, James H. Brickley, Michael F. Cavanagh, Patricia J. Boyle, Dennis W. Archer, Robert P. Griffin, Associate Justices

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

(SEAL)

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of Court.

/s/ Corbin R. Davis,
Clerk

October 30, 1990

APPENDIX C

OPINION

(State of Michigan — Court of Appeals)

(Filed November 15, 1989)

(LYNNE J. NICOLS, Plaintiff-Appellee, v ROBERT T. NICOLS, Defendant-Appellant — No. 111262)

Before: Hood, P.J., and Cynar and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment of divorce. We affirm.

I

The parties were married for 15 years and have two minor children. The marital estate at issue is substantial.

On February 27, 1988, approximately three years after the filing of the complaint for divorce, an all-day mediation was held before court appointed mediator Robert Feldstein. At approximately 4:30-5 p.m. the parties and their attorneys reached a settlement. In order to avoid any misunderstandings, Feldstein proceeded to dictate the settlement agreement in the presence of both the parties and their attorneys. At the conclusion of Feldstein's recitation of the settlement agreement, both parties stated that they understood the settlement and agreed with its terms. A six-page typewritten "memorandum of agreement" was thereafter prepared by Feldstein, verbatim from his dictation.

On March 7, 1988, the date set for trial, counsel for both the defendant and the plaintiff appeared in the Oakland Circuit Court and informed the court that trial would not be necessary as the parties had reached a settlement. In

open court, defense counsel advised Oakland Circuit Judge Gene Schnelz that the settlement was in accordance with the terms of the six-page typewritten "memorandum of agreement" prepared by mediator Feldstein:

> Your Honor, it is my understanding that the parties will enter a settlement agreement separate from judgment, and it will not be part of the actual record, but copies of the agreement will be kept between the parties.
>
> The property settlement which is essentially outlined in Plaintiff's Exhibit number One will actually be contained in a settlement, or a separation agreement.
>
> What the witness has in her hand, which is Mr. Feldstein's first draft, after the extensive mediation proceedings, is essentially an outline, a very complete outline without some enunciates and details that Mr. Carson and Mr. Blank have agreed will ultimately be included in the settlement agreement after judgment of divorce.
>
> We have no objection to this exhibit being received.

The "memorandum of agreement," was thereafter received by the court and testimony was taken establishing the statutory grounds for divorce. Pursuant to the stipulated settlement of the parties, the scheduled trial was cancelled.

Sometime after the cancellation of the trial, a dispute arose as to the final form of the settlement agreement to which the recorded divorce judgment would refer and incorporate. Defendant thereafter objected to proposed judgments submitted by the plaintiff on the grounds that a complete settlement had never been agreed to by the parties and that the proposed judgments contained terms which were inconsistent with defendant's understandings.

During August 3-12, 1988, Oakland Circuit Judge Gene Schnelz held an evidentiary hearing on defendant's objections. After taking testimony from the mediator and from the parties, Judge Schnelz found that the parties had agreed to a settlement of the case and that a sufficient "meeting of the minds" had occurred. Judge Schnelz settled the form of the judgment by entering an August 12, 1988, judgment of divorce from which the defendant appeals.

II

On appeal, defendant argues that the trial court erred in granting plaintiff's motion for entry of judgment and acted as a "super mediator" by supplying terms to the judgment which had not been previously agreed to by the parties. We disagree.

As a general rule, property settlements reached through negotiations will be upheld in the absence of fraud, duress, or mutual mistake. *Madden* v *Madden*, 125 Mich App 54, 58-59; 336 NW2d 231 (1983). MCR 2.507(H) provides:

> An agreement between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding *unless it was made in open court*, or unless evidence of the agreement is in writing subscribed by the party against whom the agreement is offered or by that party's attorney. [Emphasis added.]

As we stated in *Groulx* v *Carson*, 176 Mich App 484, 492; 440 NW2d 644 (1989): ". . . litigants are not free to disregard a settlement agreement knowingly entered into on the court record" [further] "[a] change of heart is normally insufficient to justify the setting aside of a settlement agreement." Also see *Pedder* v *Kalish*, 26 Mich App 655; 182 NW2d 739 (1970).

The court is bound to uphold such settlements, and may clarify ambiguous language provided it does not change the

substantive rights of the parties. *Greene* v *Greene*, 357 Mich 196; 98 NW2d 519 (1959); *Boucher* v *Boucher*, 34 Mich App 213; 191 NW2d 85 (1971).

In the instant case on the date scheduled for trial, counsel for the defendant advised the court that the parties had reached a settlement in accordance with the terms contained in the mediation "memorandum of agreement." Indeed, at the evidentiary hearing held in August 1988, defendant did not deny that an agreement had been reached by the parties through mediation, but merely disputed some of the terms and stated that he misunderstood the tax consequences. Defendant acknowledged that he had agreed to the major provisions of the property settlement: that he had agreed to pay to plaintiff $1 million over 10 years; a $440,000 payment to plaintiff; and a $175,000 payment for her attorney fees. We therefore conclude that the property settlement agreement between the parties, as outlined in the mediation memo, was binding on the parties, and defendant's argument that any purported stipulation was revoked is without merit.

Defendant also contends that there was no meeting of the minds on the particular provisions of the judgment. A meeting of the minds is judged by an objective standard by looking to the express words of the parties and their visible acts. *Stark* v *Kent Products, Inc*, 62 Mich App 546, 548; 233 NW2d 643 (1975), lv den 395 Mich 779 (1975).

Defendant contends that it was his understanding that he would be required to pay only 65 percent of the agreed-to $440,000, and $1 million payments, because his obligations should be reduced by his 35 percent tax bracket. Defendant also asserts that it was his understanding that the five percent interest on the $1 million payment would apply to each individual payment, rather than to the unpaid balance.

On review of the testimony, we agree with the lower court that these assertions by the defendant are not credible. Robert Feldstein, the court-appointed mediator, testified that it was understood that the five percent would apply to the unpaid principal sum. Plaintiff testified that this was also her understanding. Defendant is a man of considerable business experience and is familiar with loans and financial arrangements. To now contend that he understood that the five percent interest applied to each payment rather than the unpaid balance is not credible. We note that the parties at mediation engaged in a discussion of amortization, which would not have been necessary under defendant's interpretation of the payments. The trial court therefore properly enforced the interest provision as clarified by the language in its judgment.

Defendant also contends that he should be entitled to discount each payment by 35 percent to reflect his tax consequences. An unarticulated understanding for such discounted payments would be highly unusual. The trial court called it "mind boggling" to believe that the parties and their attorneys contemplated but failed to state that the payments could be discounted for taxes. We agree and hold that the judgment entered by the lower court accurately reflects the settlement agreed to by the parties.

We also find no merit to the other matters raised by the defendant. The lower court proeprly exercised its discretion in regard to child support, visitation, medical care, education, and other matters.

The clerical mislabeling of the judgment as a "default" justment is of no consequence.

III

In sum, we conclude that the parties entered into a binding settlement agreement as outlined by the mediation

memo. The judgment entered by the lower court following the evidentiary hearing implements the settlement agreement by settling the form of the judgment. MCR 2.602(B)(3)(c). We find no error.

Affirmed.

/s/ Harold Hood
/s/ Walter P. Cynar
/s/ Richard Allen Griffin

APPENDIX D

[*DEFAULT*] JUDGMENT OF DIVORCE

(State of Michigan — Circuit Court — County of Oakland)

(Filed August 12, 1988)

(LYNNE J. NICOLS, Plaintiff, v ROBERT T. NICOLS, Defendant — C.A. NO. 85-290611-DM; HON. GENE SCHNELZ (P20038))

At a session of said Court held in the Courthouse Towers, Pontiac, Michigan, on August 12, 1988..

PRESENT: THE HONORABLE GENE SCHNELZ,
Circuit Judge.

This matter having come on to be heard upon the Plaintiff's Complaint for Divorce filed herein; the parties, through their counsel, having consulted together and participated in a Mediation proceeding with reference to all issues in dispute; the parties, on February 27, 1988, having conducted extensive negotiations at a mediation session at the conclusion of which the Mediator, in the presence of both parties and their counsel, dictated a Memorandum of Agreement Reached February 27, 1988 (Memorandum) and determined the understanding and assent of the parties thereto; such Memorandum having been conveyed to the Court by letter, dated February 29, 1988; the Plaintiff, counsel for Plaintiff and counsel for Defendant having appeared before the Court on March 7, 1988, the day and date set for trial, at which time the Plaintiff submitted proofs in support of her Complaint for Divorce and the Court admitted such Memorandum and letter from the Mediator into evidence as Plaintiff's Exhibit 1; a transcript having been prepared of such proceedings; the Defendant

having submitted no proofs in opposition to the Complaint of Plaintiff or in support of his Answer; evidence having been taken in open Court from which it satisfactorily appears to this Court that there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved; the Plaintiff having filed a Notice of Presentment of Judgment and Qualified Domestic Relations Order; the Court having held a hearing in connection therewith on August 3rd, 4th and 5th, 1988; and the Court having made certain findings on the record;

NOW, THEREFORE, upon motion of CHARLES E. BLANK, of BUESSER, BUESSER, BLANK, LYNCH, FRYHOFF & GRAHAM, attorneys for Plaintiff, IT IS HEREBY:

DIVORCE

1. ORDERED AND ADJUDGED, and this Court by virtue of the authority therein vested and in pursuance of the statutes in such cases made and provided, and this Court in the exercise of its discretion doth ORDER AND ADJUDGE that the marriage between the said Plaintiff, LYNNE J. NICOLS, and the said Defendant, ROBERT T. NICOLS, be dissolved, and the same is hereby dissolved accordingly, and that said parties are, and each of them is, free from the obligations thereof.

CUSTODY OF MINOR CHILDREN

2. IT IS FURTHER ORDERED AND ADJUDGED that the Wife shall have the physical custody and the parties shall have joint legal custody of the minor children of the parties hereto, to-wit:

> JONATHAN T. NICOLS, born 2/10/75, now age 13; and JAY R. NICOLS, born 10/2/76, now age 11;

until each child attains the age of eighteen (18) years or graduates from high school, whichever occurs later, or until the further order of the Court.

3. IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff Wife shall promptly notify the Friend of the Court when said minor children are moved from their present address of 1155 Covington, Birmingham, Michigan.

4. IT IS FURTHER ORDERED AND ADJUDGED that the domicile or residence of the minor children shall not be moved from the State of Michigan without the approval of the judge who awarded custody, or the judge's successor.

VISITATION

5. IT IS FURTHER ORDERED AND ADJUDGED that the Defendant Husband shall be entitled to liberal rights of visitation with the minor children, including:

A) Every other weekend from Friday after school until Monday morning, at which time Defendant father will be responsible to see that the children get to school;

B) One (1) midweek late afternoon/early evening contact for dinner during each week that there is overnight weekend visitation;

C) Two (2) late afternoon/early evening midweek contacts for dinner during weeks when Defendant father does not have overnight weekend visitation;

D) One-half (½) of all the longer school vacation periods of Christmas, Easter, mid-winter break, if any, and a disproportionately favorable portion of summer vacation (for example, if the summer vacation period is thirteen (13) weeks in length, the Defendant father is to receive

seven (7) weeks and the Plaintiff mother six (6) weeks);

E) Alternating and/or sharing all other major civil and religious holidays; and,

F) Defendant father shall have the children each Father's Day and on his birthday and Plaintiff mother shall have the children each Mother's Day and on her birthday.

The visitation rights set forth herein shall continue until the further order of the Court.

SUPPORT OF MINOR CHILDREN

6. IT IS FURTHER ORDERED AND ADJUDGED that the Defendant Husband shall pay to the Plaintiff Wife for the support and maintenance of the minor children, namely:

JONATHAN T. NICOLS, born 2/10/75, now age 13; and JAY R. NICOLS, born 10/2/76, now age 11;

the sum of Two Hundred ($200.00) Dollars per week per child (an initial total of Four Hundred ($400.00) Dollars per week), payable in advance, said payments to continue for each child until each reaches the age of eighteen (18) or graduates from high school, whichever is later, or, in exceptional circumstances, until the further order of the Court. The support provided for in this paragraph 6 for a minor child shall be abated by that amount which the Friend of the Court and/or Michigan Supreme Court guidelines furnish for any continuous periods for overnight visitation as such guidelines may be amended from time to time.

7. IT IS FURTHER ORDERED AND ADJUDGED that the obligations for such child support payments shall commence on entry of this Judgment of Divorce and shall be made through the office of the Oakland County Friend of the Court.

8. IT IS FURTHER ORDERED AND ADJUDGED That the Defendant Husband shall pay all reasonable and necessary medical, dental, hospital, orthodontic, optometric, prescription drug expenses and shall pay the hospitalization insurance expense of the minor children of the parties. The Husband's obligation to pay such above-described expenses shall continue for each child until he obtains the age of eighteen (18) years or graduates from high school, whichever occurs later, or in exceptional circumstances, until the further order of the Court. The Plaintiff Wife will exercise reasonable efforts to follow procedures which will enable the Defendant to secure coverage or reimbursement from his medical insurance coverage, if any, and will consult with and secure the consent of the Defendant, who has joint legal custody, regarding elective medical procedures for such children.

9. IT IS FURTHER ORDERED AND ADJUDGED that the Defendant Husband, Social Security No. 383-20-3113, and whose address is 1150 W. Maple Road, Troy, Michigan 48084, and the Plaintiff Wife, Social Security No. 375-54-5096, and whose address is 1155 Covington, Birmingham, Michigan 48010, shall promptly notify the Friend of the Court in writing of any change in his or her address. The Plaintiff Wife shall be entitled to claim the income tax dependency exemptions for the minor children for calendar year 1988. For years 1989 and thereafter, the parties shall alternate the right to claim such dependency exemptions; provided, however, that the Defendant shall be entitled to claim such exemptions only in the event that the use of such exemptions on his U.S. Individual Income Tax Returns will result in a reduction of income tax on his tax return for such year.

PRIVATE SCHOOL EXPENSE

10. IT IS FURTHER ORDERED AND ADJUDGED that Defendant Husband, in accordance with past family prac-

tices, shall be responsible for and shall pay the private school expenses for each minor child until he attains the age of eighteen (18) years or graduates from high school, whichever occurs later. The choice of such school will be a joint decision of the parties.

ORDER TO PROCEED WITHOUT FRIEND OF THE COURT RECOMMENDATION

11. IT IS FURTHER ORDERED AND ADJUDGED that this matter may proceed to Judgment without a recommendation by the Friend of the Court.

ALIMONY

12. IT IS FURTHER ORDERED AND ADJUDGED that at this time neither of the parties hereto shall pay to the other nor be entitled to receive alimony from the other. Alimony for Defendant Husband is forever barred. Alimony for the Plaintiff Wife is reserved for consideration by the Court only in the event of the Defendant Husband's default and failure to cure such default in any property settlement obligation contained in this Judgment of Divorce after notice and cure period in the manner and to the extent of same as provided in paragraph 31 hereof, such cure provisions shall not be interpreted to apply to any security provisions contained within this Judgment. The payment, in full, of any cash property settlement balance which is reduced to present value as may be provided for hereinafter, shall constitute a curing of a default. If the Defendant fully pays all property settlement obligations to the Plaintiff, whether in original amounts or as reduced to present value as described hereinafter, regardless of when such payment occurs, alimony for the Plaintiff Wife shall thereafter be forever barred.

FRIEND OF THE COURT SERVICE FEE

13. IT IS FURTHER ORDERED AND ADJUDGED that the Defendant Husband shall pay to the Friend of the Court

the sum of $2.00 per month, payable semi-annually, in advance, on January 2, and July 2 hereafter, while a judgment for child support or alimony is operative. The initial payments for the months before the due date shall be made forthwith.

ORDER AUTHORIZING INCOME WITHHOLDING

14. IT IS FURTHER ORDERED AND ADJUDGED that an order of income withholding shall be entered pursuant to P.A. 294 and 295 of 1982, should arrearages in child support or alimony exceed an amount equal to four (4) weeks of payments under this Judgment, as it may be amended from time to time. Should an Order of Income Withholding be entered under the provisions of P.A. 295 of 1982 (MCLA 552.503 et seq. and MCLA 552.60 et seq.), and the fixed amount of arrearage is reached, the Office of the Friend of the Court shall send notice of the arrearage to the payor by ordinary mail to payor's last known address. Said Order of Income Withholding shall take effect fourteen (14) days after the date of the notice unless the payor responds by requesting a hearing or by paying the arrearage in full.

SUPPORT PAYMENTS TO HAVE FORCE AND EFFECT OF JUDGMENT WHEN DUE; NO RETROACTIVE MODIFICATION

15. IT IS FURTHER ORDERED AND ADJUDGED that except as otherwise provided in Section 3 of the Support and Visitation Enforcement Act, Act. No. 295 of the Public Act of 1982, being Section 552.603 of the Michigan Compiled Laws, a support order that is part of a judgment or is an order in a domestic relations matter as that term is defined in Section 31 of the Friend of the Court Act, Act No. 294 of the Public Acts of 1982, being Section 552.531 of the Michigan Compiled Laws, is a judgment on and after the date each support payment is due, with the full

force, effect, and attributes of a judgment of this state, and is not, on and after the date it is due, subject to retroactive modification.

PROPERTY SETTLEMENT AND PROVISION IN LIEU OF DOWER

16. IT IS FURTHER ORDERED AND ADJUDGED that as and for a property division between the parties, the Plaintiff Wife shall receive the assets, benefits and things of value, as set forth in greater detail in paragraphs 16A. through 16G. hereinafter:

A. Forthwith upon entry of this Judgment of Divorce in the above-mentioned pending action, the Plaintiff Wife shall become and be the sole and separate owner of the jointly owned marital home of the parties located at 1155 Covington Road, Birmingham, Michigan, and more particularly described as:

> Part of the Northeast ¼ of Section 27, T2N, R10E, Bloomfield Township, Oakland County, Michigan, described as beginning at the Southeast corner of Lot 1376 of JUDSON BRADWAY'S BLOOMFIELD VILLAGE NO. 10, (Liber 106, Page 16), said point distant S 1°-24'E 1741.03 feet and N 87°-12'30"W 33.09 feet from the Northeast corner of said Section 27; thence N 87°-12'30"W 155.40 feet along the south line of said lot; thence S 9°-38'W 120.70 feet; thence S 87°-15'45"E 178.5) feet to the West line of Covington Road, 66 feet wide; thence N 1°-24'W 120.00 feet along said West line to the point of beginning.

subject to the outstanding first mortgage dated October 29, 1984, given by the parties to Michigan National Bank of Detroit in the original principal amount of $325,000.00. All mortgage payments, property taxes, insurance premiums, assessment installments and all other encumbrances

on the property which have fallen due through the date of the entry of this Judgment of Divorce shall be forthwith paid by the Defendant Husband. The Plaintiff Wife shall pay the unpaid balance on such outstanding first mortgage falling due after the entry of this Judgment of Divorce and she shall indemnify and hold the Defendant Husband harmless from any loss, damage or expense of any kind in connection therewith. In order to implement the provisions of this paragraph, the Defendant Husband shall forthwith execute and deliver to the Plaintiff Wife a properly executed, witnessed and notarized, Quit Claim Deed, along with quit claim assignments of homeowner's insurance, title insurance and property tax escrow accounts, if any, relating to such property. If the Defendant Husband shall fail to execute and deliver said deed, Plaintiff Wife may record a copy of this Judgment of Divorce and said recording shall constitute a conveyance of said premises from the Defendant Husband to the Plaintiff Wife in accordance with the statute in such case made and provided.

B. The Plaintiff Wife shall become and be the sole and separate owner of the household furniture, furnishings, accessories, appliances and art objects in and about the marital home of the parties at 1155 Covington Road, Birmingham, Michigan, with the exception of the following items which shall become the sole and separate property of the Defendant Husband: the contents of his office/den, the contents of his bedroom, chest and companion chair in dining room, one (1) outside lounge chair and other miscellaneous personal property, which the Defendant Husband shall remove from the marital home within thirty (30) days after entry of this Judgment. The Defendant Husband shall vacate the home on or before May 1, 1988. The Defendant Husband will supply the Plaintiff Wife, through her counsel, with a list of whatever items of personal effects he seeks to remove and retain. Should there be a

failure of agreement by the Defendant Husband and the Plaintiff Wife regarding what constitutes such personal effects, this issue will be submitted to the Court or the Friend of the Court for a dispositive ruling.

C. The Defendant Husband shall pay to the Plaintiff Wife, as further property settlement, cash in the amount of Four Hundred and Forty Thousand ($440,000.00) Dollars, less the credit referred to below, payable as follows:

1) Fifth Thousand ($50,000.00) Dollars, less the credit referred to in this sub-paragraph, to be paid forthwith upon entry of this Judgment of Divorce. Against such obligation, the Defendant shall receive a credit in the amount of: (a) $5,151.88 representing the amount by which his payment to the Internal Revenue Service in the amount of $15,361.72 on June 19, 1987, exceeded that payment required by him pursuant to the Order For Payment Of Taxes entered by this Court on June 19, 1987, plus (b) $5,000.00 representing a prior contribution by Defendant toward Plaintiff Wife's attorney's fees;

2) One Hundred Thousand ($100,000.00) Dollars, to be paid within sixty (60) days from the date of the entry of this Judgment of Divorce; and

3) Two Hundred and Ninety Thousand ($290,000.00) Dollars to be paid within one hundred and eighty (180) days from the date of the entry of this Judgment of Divorce.

D. The Defendant Husband shall pay to the Plaintiff Wife, as further property settlement, One Million ($1,000,000.00) Dollars, payable in monthly installments of Eight Thousand Three Hundred Thirty-Three and $^{33}/_{100}$

($8,333.33) Dollars, plus interest on the unpaid balance at the annual rate of five (5%) percent, commencing thirty (30) days subsequent to the entry of this Judgment and on the same day of the next consecutive one hundred nineteen (119) months (for a total of 120 monthly payments). Such payments of principal and interest shall be in accordance with the amortization schedule attached hereto as Exhibit A. Monthly payments which are not paid when due shall incur a late fee which shall accrue from the due date of such payment at the rate of ten (10%) percent per annum on the amount of the late payment until paid, provided, however, that in the event that Defendant makes such payment within the forty-five (45) day cure period provided for hereinafter such late fee shall be automatically waived. In the event that a monthly installment provided for herein is not made within thirty (30) days after its due date, the Plaintiff Wife may, by registered or certified mail, return receipt requested (with a copy similarly mailed to Defendant's counsel), give the Defendant Husband written notice that he is in default. In the event that such default is not cured within forty-five (45) days after the date such written notice of default is received or delivery is refused, the Plaintiff Wife may elect to accelerate the entire unpaid principal balance of the One Million ($1,000,000.00) Dollar property settlement obligation provided for in this paragraph 16D., plus accumulated interest by giving notice of such acceleration as provided above. In the event that such unpaid balance is accelerated and such accelerated balance is fully paid, such accelerated balance shall be in a reduced amount by adjusting it to a "present value" based upon then prevailing interest rates. In the event of the inability of the parties to agree upon such "present value", the parties shall accept the determination of Joseph C. Cunningham, of Plante Moran, C.P.A., or his successor within such firm. Defendant shall have the right to prepay this obligation at a reduced present value amount, com-

puted as stated above, at any time without notice or penalty.

In the event of a sale for cash (not exchange) by the Defendant Husband of his stock in L & L Wine and Liquor Corporation and/or Tyfield Importers, Inc., the Defendant Husband shall forthwith apply one-fourth (¼th) of the net, after-tax sales proceeds therefrom against the then unpaid balance, if any, of such One Million ($1,000,000.00) Dollar property settlement obligation to the Plaintiff Wife as provided for in this paragraph 16D. Such application against the unpaid balance shall likewise be on a reduced "present value" basis to be quantified by Joseph C. Cunningham, of Plante Moran, C.P.A., or his successor within such firm, in the event that the parties are unable to agree. The application of such sales proceeds against the property settlement balance shall result in an appropriate reduction in the monthly installments over the remaining life of the obligation. If the Defendant exchanges (not sells) his stock in L & L Wine and Liquor Corporation and/or Tyfield Importers, Inc., the Defendant's obligation to apply the abovementioned portion of sales proceeds shall apply to a sale of such substituted asset.

E. The Plaintiff Wife shall become the sole and separate owner of the 1984 Volkswagen automobile which she is presently driving free and clear of all liens.

F. The Plaintiff Wife shall become and be the sole and separate owner of one-half (½) of the Defendant Husband's accounts, determined as of January 31, 1988, in excess of Forty-Three Thousand Dollars ($43,000.00), in the Restated L & L Wine and Liquor Corporation Profit Sharing Plan and Trust, effective July 1, 1984, as amended. The Defendant Husband's account totaled Two Hundred Sixty-Eight Thousand Two Hundred Forty-Eight and $^{20}/_{100}$ ($268,248.20) Dollars as of January 31, 1987. Earnings thereon and further employer contributions have been

made since that date, and the Defendant Husband is indebted to such Plan in the amount of Forty-Three Thousand ($43,000.00) Dollars, including interest. The formal partial assignment of the Defendant Husband's interest to the Plaintiff Wife shall be accomplished by a Qualified Domestic Relations Order (QDRO) to be entered by the Court coincident with the entry of this Judgment of Divorce between the parties.

G. The Plaintiff Wife shall become and be the sole and separate owner of all other personal property in her possession or control inclusive of her clothing, her jewelry, her bank accounts and the like.

17. IT IS FURTHER ORDERED AND ADJUDGED that as and for a property division between the parties, the Defendant Husband shall receive the assets, benefits and things of value, as set forth in greater detail in paragraphs 17A through 17J hereinafter.

A. The Defendant Husband shall remain and be the sole and separate owner of the entirety of his business interests, including his capital stock in L & L Wine & Liquor Corporation, Robert T. Nicols Corporation, Tyfield Importers, Inc., and R & M Liquor Corporation, subject to any and all outstanding obligations relating thereto, against which the Defendant Husband shall indemnify the Plaintiff Wife from any loss, liability, damage or expense of any kind.

B. The Defendant Husband shall remain and be the sole and separate owner of One Hundred (100%) percent of the capital stock of Palm Beach Construction Company, a Michigan corporation, which corporation has been the title holder (and Husband is and separately shall be the title holder) of record of the premises commonly known as 695 Vaughn Road, Bloomfield Hills, Michigan, and more particularly described as:

Land in the City of Bloomfield Hills, Oakland County, Michigan described as: Part of Lot 34 of Oak Knob Farms located in Sections 15 and 22, Town 2 North, Range 10 East, City of Bloomfield Hills, Township of Bloomfield, Oakland County, Michigan, according to the plat thereof as recorded in liber 18 of Plats, page 12, Oakland County Records, described as follows: Beginning at a point on the east line of Lahser Road, said point being the corner common to Lots 11 and 34 of said Subdivision and center of a culvert, thence on a traverse on the line common to Lots 11 and 34 described as follows: South 89 degrees 38 minutes east 180 feet to a point; thence south 43 degrees, 04 minutes east 311 feet to a point; thence south 0 degrees 20 minutes west 180 feet to a point; the common corner of Lots 11 and 34 at Bloomfield Center Road and marked by a notch in the dam forming Mirror Lake; thence north 47 degrees, 20 minutes east along the westerly line of Bloomfield Center Road, 500 feet to a point; thence north 53 degrees 37 minutes 10 seconds, west 350 feet to a point on Ridge Wood Road; thence along the southwesterly line of Ridge Wood Road in a southwesterly direction and following the curves of said road 529 feet to a point of beginning.

subject to all encumbrances thereon, including the outstanding mortgage and any and all outstanding obligations thereon, against which the Defendant Husband shall indemnify and hold the Plaintiff Wife harmless from any obligation, loss, liability or expense of any kind.

C. The Defendant Husband shall remain and be the sole and separate owner of the residential property located at 602 Eppley Drive, Aspen, Colorado, and more particularly described as:

Starwood Subdivision, Unit 16, Lot R-101, County of Pitkin, State of Colorado.

subject to all encumbrances thereon, including the outstanding mortgage and any and all outstanding obligations thereon, against which the Defendant Husband shall indemnify and hold the Plaintiff Wife harmless from any obligation, loss, liability or expense of any kind.

D. The Defendant Husband shall remain and be the sole and separate owner of the household furniture, furnishings, accessories, appliances and art objects in and about the residence located at 602 Eppley Drive, Aspen, Colorado.

E. The Defendant Husband shall remain the sole and separate owner of the CIS Equipment Trust 1984-B, subject to any and all encumbrances thereon, against which Defendant Husband shall indemnify and hold the Plaintiff Wife harmless from any obligation, loss, liability or expense of any kind.

F. The Defendant Husband shall remain and be the sole and separate owner, free and clear of any claim of the Plaintiff Wife, of the Merrill Lynch or other brokerage account contents, including the approximately Three Hundred Thousand ($300,000.00) Dollars in value of securities presently in his possession subject to the provisions of paragraph 18 hereinafter.

G. The Defendant Husband shall remain and be the sole and separate owner, free and clear of any claim of the Plaintiff Wife, of a land contract receivable having a current approximate balance of Six Thousand Two Hundred Fifty ($6,250.00) Dollars.

H. The Defendant Husband shall remain and be the sole and separate owner of the 1973 Mercedes Benz, the 1979 Mercedes Benz and the 1984 Saab automobiles presently titled in his name, subject to all outstanding

encumbrances, against which the Defendant Husband shall indemnify and hold the Plaintiff Wife harmless from any obligation, loss, liability or damage of any kind.

I. The Defendant Husband shall remain and be the sole and separate owner of the first Forty-Three Thousand ($43,000.00) Dollars, plus one-half (½) of the balance of the Defendant Husband's account stated as of January 31, 1988, in the Restated L & L Wine & Liquor Corporation Profit Sharing Plan and Trust, effective July 1, 1984, as amended, plus all contributions to such account subsequent to January 31, 1988 except as to earnings on the share of the Plaintiff Wife.

J. The Defendant Husband shall become and be the sole and separate owner of all other personal property in his possession or control, inclusive of his clothing, his jewelry, his bank accounts and the like and the personal property awarded to him in paragraph 16B.

18. The Defendant Husband shall assume and pay the Manufacturers Bank Installment note #1000066905000 dated January 6, 1987 and indemnify and hold the wife harmless from any obligation, loss, liability or damage of any kind in connection therewith.

19. Upon post-Judgment Motion of the Plaintiff Wife, made hereafter in this action, the Court will appoint a Receiver who shall trace any and all bonds, unregistered securities and/or other such instruments held, acquired, sold or otherwise disposed of by the Husband during the pendency of this action for Divorce. The Husband shall provide to the Receiver an accounting through the date of this Judgment of the acquisition, sale or other transformation of these bonds, unregistered securities or other instruments into other identifiable marital assets and otherwise account for the expenditure of the funds realized from the sale of such bonds or securities for legitimate household,

family or business expenditures, including the repayment of debt for legitimate household, family or business expenditures, to the extent that his declared income could not reasonably provide for same. The Receiver shall determine if there are any bonds or securities which are unaccounted for as provided above, and, if so, the Husband shall pay to Plaintiff Wife an amount equal to one-half (½) of such unaccounted for bonds, unregistered securities or other instruments over and above the Three Hundred Thousand ($300,000.00) in value of securities hereinbefore awarded to Husband as his sole and separate property.

20. IT IS FURTHER ORDERED AND ADJUDGED that the provisions of this Property Settlement shall be in full and complete satisfaction of all claims of every nature and description by the Plaintiff Wife against the Defendant Husband and by the Defendant Husband against the Plaintiff Wife.

21. IT IS FURTHER ORDERED AND ADJUDGED that each of the parties shall pay to the other the sum of $1.00, which shall be in lieu of and in full satisfaction of any and all dower rights which either party may have in any property now owned or hereafter acquired by the other.

EXECUTION OF DOCUMENTS

22. IT IS FURTHER ORDERED AND ADJUDGED that each party shall at any time and from time to time hereafter take any and all steps and execute, acknowledge and deliver to the other party any and all further instruments and assurances which may reasonably be required for the purpose of giving full force and effect to the provisions of this Judgment of Divorce.

23. IT IS FURTHER ORDERED AND ADJUDGED that in the event of the failure or refusal of either of the parties to execute and deliver any necessary or required deeds, endorsements, acknowledgments, instruments, conveyances

or other documents to the other, then this Judgment shall be deemed to stand in the place of such document and shall have the same effect as such document deed, instrument or conveyance would have if properly executed, acknowledged and delivered.

24. IT IS FURTHER ORDERED AND ADJUDGED that forthwith upon the entry of this Judgment, each party shall assign and transfer to the other any existing policy of fire, casualty, collision, indemnity, or liability insurance covering property awarded to the other by the terms of this Judgment.

RETENTION OF JURISDICTION

25. IT IS FURTHER ORDERED AND ADJUDGED that the Court shall retain jurisdiction of this matter to enforce and implement the executory terms of the property settlement provisions, but not to modify same.

INSURANCE

26. IT IS FURTHER ORDERED AND ADJUDGED that any rights of either party in any policy or contract of life, endowment or annuity insurance of the other as beneficiary or otherwise, are hereby extinguished; provided, however, that the Defendant Husband shall designate the minor children of the parties as irrevocable beneficiaries of not less than Fifty Thousand ($50,000.00) Dollars worth of life insurance insuring his life and shall keep said coverage in effect until each of the children has reached eighteen (18) years of age or graduated from high school, whichever event last occurs. The Defendant Husband shall from time to time provide the Plaintiff Wife with such written assurances of the continuation of the beneficiaries designation and the continued existence of the required coverage as she may reasonably require, but not more frequently than annually.

DISPOSITION OF PENSION, ANNUITY AND RETIREMENT BENEFITS

27. IT IS FURTHER ORDERED AND ADJUDGED that, except for the interest awarded to the Plaintiff Wife in the Restated L & L Wine and Liquor Corporation Profit Sharing Plan and Trust, effective July 1, 1984, as amended as awarded pursuant to a separate Qualified Domestic Relations Order pursuant to paragraph 16F of this Judgment, neither of the parties hereto shall have any interest in any of the other following rights of the other:

A. Any pension, annuity or retirement benefits;

B. Any accumulated contributions in any pension, annuity or retirement system; and

C. Any right or contingent right in and to any unvested pension, annuity or retirement benefit.

COUNSEL/EXPERT WITNESS FEES AND COSTS

28. IT IS FURTHER ORDERED AND ADJUDGED that the Defendant Husband shall pay to the lawfirms of Buesser, Buesser, Blank, Lynch, Fryhoff & Graham, and Bruce O. Wilson, attorneys for the Wife, the sum of One Hundred Seventy-Five Thousand ($175,000.00) Dollars by way of his full and final contribution to the counsel/expert witness fees and Court costs incident to the negotiation of this Agreement and the pending action for Divorce. Such contribution shall be paid by the Husband as follows:

A. One-Third (⅓rd) of the amount or Fifty-Eight Thousand Three Hundred Thirty-Three and $^{33}/_{100}$ ($58,333.33) Dollars to be paid within sixty (60) days from date of entry of Judgment of Divorce; and

B. Two-Thirds (⅔rds) or One Hundred Sixteen Thousand Six Hundred Sixty-Seven and $^{67}/_{100}$ ($100,016.67) Dollars to be paid within one hun-

dred eighty (180) days from date of entry of Judgment of Divorce.

Such contribution, when paid, shall constitute full satisfaction of the Husband's obligations pursuant to the terms of the Order For Payment Of Interim Attorney Fees and Costs, dated November 18, 1986, entered in the pending action for Divorce. Such sums shall not be reduced by the payment heretofore made by the Defendant pursuant to the Order For Payment of Interim Counsel Fees and Costs, dated May 29, 1985. The obligations of the Husband to make the contribution to the counsel/expert witness fees and costs of the Wife provided for in this paragraph 28 are subject to paragraphs 30 and 31 of this Judgment of Divorce, such paragraphs entitled SECURITY AND INJUNCTIVE PROVISIONS.

29. IT IS FURTHER ORDERED AND ADJUDGED that each party shall be obligated to forthwith pay one-half (½) of the statement of the Mediator.

SECURITY AND INJUNCTIVE PROVISIONS

30. IT IS FURTHER ORDERED AND ADJUDGED that, so as to provide security to the Wife for the payment by the Husband of the Four Hundred Forty Thousand ($440,000.00) Dollar Property Settlement payments provided for in paragraph 16C. hereinabove and the payment by the Husband of the contribution to counsel/expert witness fees and costs in the amount of One Hundred Seventy-Five Thousand ($175,000.00) Dollars provided for in paragraph 28 hereinabove, the Husband, individually or as a representative of Palm Beach Construction Company, or through his assignees or agents shall not, directly or indirectly, assign or otherwise transfer or further encumber his capital stock in Palm Beach Construction Company or the real estate at 695 Vaughn Road, Bloomfield Hills, Michigan, more particularly described as:

Land in the City of Bloomfield Hills, Oakland County, Michigan described as: Part of Lot 34 of Oak Knob Farms located in Sections 15 and 22, Town 2 North, Range 10 East, City of Bloomfield Hills, Township of Bloomfield, Oakland County, Michigan, according to the plat thereof as recorded in liber 18 of Plats, page 12, Oakland County Records, described as follows: Beginning at a point on the east line of Lahser Road, said point being the corner common to Lots 11 and 34 of said Subdivision and center of a culvert, thence on a traverse on the line common to Lots 11 and 34 described as follows: South 89 degrees 38 minutes east 180 feet to a point; thence south 43 degrees, 04 minutes east 311 feet to a point; thence south 0 degrees 20 minutes west 180 feet to a point; the common corner of Lots 11 and 34 at Bloomfield Center Road and marked by a notch in the dam forming Mirror Lake; thence north 47 degrees, 20 minutes east along the westerly line of Bloomfield Center Road, 500 feet to a point; thence north 53 degrees 37 minutes 10 seconds, west 350 feet to a point on Ridge Wood Road; thence along the southwesterly line of Ridge Wood Road in a southwesterly direction and following the curves of said road 529 feet to a point of beginning.

nor shall he subject Palm Beach Construction Company nor in any way allow it to be subjected to any further indebtedness, encumbrance or liability until such time as the Wife has received such Four Hundred Forty Thousand ($440,000.00) Dollar Property Settlement Payment and counsel for the Wife have received such One Hundred Seventy-Five Thousand ($175,000.00) Dollars Contribution to counsel/expert witness fees and costs; provided, however, that the Husband or Palm Beach Construction Company may draw sums from the present mortgage, dated May 12,

1988, between Robert T. Nicols and Merrill Lynch Equity Management, Inc., in the amount of $1,500,000.00 (said mortgage being a revolving line of credit debt), to pay off the original Michigan National Bank mortgage in the amount of approximately $816,000.00, to pay off approximately $300,000.00 in contractor's bills existing as of February 27, 1988 and to complete construction necessary to issuance of an Occupancy Permit of the residence being built on the property, so long as such funds for completion of construction are used only for payment of contractor's bills upon a showing of a sworn statement from the contractor that the obligation has been paid and production of a waiver of lien from such contractor and in no event shall the sum total of all mortgage balances exceed the sum of $1,500,000.00. Except as provided herein to the contrary, the above described real property and any and all borrowings in excess of the above limitations are subject to the abovementioned $440,000.00 indebtedness owed to the Wife and the $175,000.00 indebtedness owing to counsel for the Wife. The Husband is hereby required to produce forthwith and quarterly thereafter to this Court and to counsel for Plaintiff an accounting of the funds drawn and expended from such present mortgage and a copy of such authorizing contractors statements and waiver of liens as to show the funds are being used to complete construction, and the Defendant, his agents, employees and assignees are hereby enjoined from using said mortgage funds for any other purpose until said sum of $440,000.00 and $175,000.00 are paid in full.

31. IT IS FURTHER ORDERED AND ADJUDGED that, in the event of a default by the Husband in the timely payment of the above-mentioned Four Hundred Forty Thousand ($440,000.00) Dollars Property Settlement obligation to the Wife or the timely payment of the above-mentioned One Hundred Seventy-Five Thousand ($175,000.00) Dollar contribution to the counsel/expert witness fee and

costs obligation to counsel for the Wife, which default remains uncured for a period of thirty (30) days after written notice given as set forth above in Paragraph 16D., the Court, upon Motion of the Wife or Buesser, Buesser, Blank, Lynch, Fryhoff & Graham, shall appoint a Receiver, to which Receiver the Court shall award in trust the right, title and interest of the Defendant, ROBERT T. NICOLS, to his one hundred (100%) percent of the stock of the Husband in Palm Beach Construction Company, the Receiver shall thereafter cause the corporation to maintain and sell, at the highest available price with ordinary marketing activities unless specifically authorized otherwise by the Court, the real estate at 695 Vaughn Road, Bloomfield Hills, Michigan, more particularly described as:

> Land in the City of Bloomfield Hills, Oakland County, Michigan described as: Part of Lot 34 of Oak Knob Farms located in Sections 15 and 22, Town 2 North, Range 10 East, City of Bloomfield Hills, Township of Bloomfield, Oakland County, Michigan, according to the plat thereof as recorded in liber 18 of Plats, page 12, Oakland County Records, described as follows: Beginning at a point on the east line of Lahser Road, said point being the corner common to Lots 11 and 34 of said Subdivision and center of a culvert, thence on a traverse on the line common to Lots 11 and 34 described as follows: South 89 degrees 38 minutes east 180 feet to a point; thence south 43 degrees, 04 minutes east 311 feet to a point; thence south 0 degrees 20 minutes west 180 feet to a point; the common corner of Lots 11 and 34 at Bloomfield Center Road and marked by a north in the dam forming Mirror Lake; thence north 47 degrees, 20 minutes east along the westerly line of Bloomfield Center Road, 500 feet to a point; thence north 53 degrees 37 minutes 10 seconds, west 350 feet to a

point on Ridge Wood Road; thence along the southwesterly line of Ridge Wood Road in a southwesterly direction and following the curves of said road 529 feet to a point of beginning.

From the net sales proceeds, the Receiver shall pay any balance due on the initial Four Hundred Forty Thousand ($440,000.00) Dollar Property Settlement obligation and any balance due on the One Hundred Seventy Five Thousand ($175,000.00) Dollar obligation for attorney fees and costs, which obligations shall be fully accelerated. At any time prior to Closing the Defendant Husband can terminate the Receivership and any interest or rights of the Receiver by paying the balance due on such $440,000.00 and $175,000.00 payments and the fees and costs of the Receiver. Should the net sales proceeds be insufficient to satisfy the unpaid balances of such obligations, the Receiver shall apply the net sales proceeds against the unpaid obligations on a pro-rata basis and the Defendant shall remain obligated for the deficiency, if any. Should any sales proceeds remain after the aforesaid payments, the balance of such sales proceeds shall be paid to the Husband.

QUALIFIED DOMESTIC RELATIONS ORDER

32. IT IS FURTHER ORDERED AND ADJUDGED that the terms of a certain Qualified Domestic Relations Order bearing the same date as the date of this Judgment, be and the same hereby is incorporated (but not merged) in this Judgment of Divorce by reference as though specifically set forth in its entirety herein.

_____

Circuit Judge

(*Certification Omitted*)

AMORTIZATION SCHEDULE

Principal	$1,000,000	
Interest	5.00%	
Payment	$8,333.33	principal plus interest
Period	120	months

Year	*Month*	*Period*	*Beginning Principal*	*Interest*	*Principal*	*Total Payment*
1	1	1	1,000,000.00	4,166.67	8,333.33	12,500.00
1	2	2	991,666.67	4,131.94	8,333.33	12,485.27
1	3	3	983,333.34	4,097.22	8,333.33	12,430.55
1	4	4	975,000.01	4,062.50	8,333.33	12,395.83
1	5	5	966,666.68	4,027.78	8,333.33	12,361.11
1	6	6	958,333.35	3,983.06	8,333.33	12,326.39
1	7	7	950,000.02	3,958.33	8,333.33	12,291.66
1	8	8	941,666.89	3,923.61	8,333.33	12,256.94
1	9	9	933,333.36	3,888.89	8,333.33	12,222.22
1	10	10	925,000.03	3,854.17	8,333.33	12,187.50

Year	*Month*	*Period*	*Beginning Principal*	*Interest*	*Principal*	*Total Payment*
1	11	11	916,666.70	3,819.44	8,333.33	12,152.77
1	12	12	908,333.37	3,784.72	8,333.33	12,118.05
2	1	13	900,000.04	3,750.00	8,333.33	12,083.33
2	2	14	891,566.71	3,715.28	8,333.33	12,048.61
2	3	15	883,333.38	3,680.56	8,333.33	12,013.89
2	4	16	875,000.05	3,645.83	8,333.33	11,979.16
2	5	17	866,666.72	3,611.11	8,333.33	11,944.44
2	6	18	858,333.39	3,576.39	8,333.33	11,909.72
2	7	19	850,000.06	3,541.67	8,333.33	11,875.00
2	8	20	841,666.73	3,506.94	8,333.33	11,840.27
2	9	21	833,333.40	3,472.22	8,333.33	11,805.55
2	10	22	825,000.07	3,437.50	8,333.33	11,770.83
2	11	23	816,666.74	3,402.78	8,333.33	11,736.11
2	12	24	808,333.41	3,368.06	8,333.33	11,701.39
3	1	25	800,000.08	3,333.33	8,333.33	11,566.66
3	2	26	791,666.75	3,298.61	8,333.33	11,631.94
3	3	27	783,333.42	3,263.89	8,333.33	11,597.22
3	4	28	775,000.09	3,228.17	8,333.33	11,562.50
3	5	29	766,666.76	3,194.44	8,333.33	11,527.77

Year	*Month*	*Period*	*Beginning Principal*	*Interest*	*Principal*	*Total Payment*
3	6	30	758,333.43	3,159.72	8,333.33	11,493.05
3	7	31	750,000.10	3,125.00	8,333.33	11,458.33
3	8	32	741,666.77	3,090.28	8,333.33	11,423.61
3	9	33	733,333.44	3,055.56	8,333.33	11,388.89
3	10	34	725,000.11	3,020.83	8,333.33	11,354.16
3	11	35	716,656.78	2,986.11	8,333.33	11,319.44
3	12	36	708,333.45	2,951.39	8,333.33	11,284.72
4	1	37	700,000.12	2,916.67	8,333.33	11,250.00
4	2	38	691,666.79	2,881.91	8,333.33	11,215.27
4	3	39	683,333.46	2,847.22	8,333.33	11,180.55
4	4	40	675,000.13	2,812.50	8,333.33	11,145.83
4	5	41	666,666.80	2,777.78	8,333.33	11,111.11
4	6	42	658,333.47	2,743.96	8,333.33	11,076.39
4	7	43	650,000.14	2,708.33	8,333.33	11,041.66
4	8	44	611,666.81	2,673.61	8,333.33	11,006.94
4	9	45	633,333.48	2,638.89	8,333.33	10,972.22
4	10	46	625,000.15	2,601.17	8,333.33	10,937.50
4	11	47	616,666.82	2,568.45	8,333.33	10,902.78
4	12	48	608,333.49	2,534.72	8,333.33	10,868.05

Year	Month	Period	Beginning Principal	Interest	Principal	Total Payment
5	1	49	600,000.16	2,500.00	8,333.33	10,833.33
5	2	50	591,666.83	2,466.29	8,333.33	10,798.61
5	3	51	583,333.50	2,430.56	8,333.33	10,763.89
5	4	52	576,000.17	2,395.83	8,333.33	10,729.16
5	5	53	566,666.84	2,361.11	8,333.33	10,694.44
5	6	54	558,333.51	2,326.39	8,333.33	10,659.72
5	7	55	550,000.18	2,291.67	8,333.33	10,625.00
5	8	56	541,666.85	2,256.95	8,333.33	10,590.28
5	9	57	533,333.52	2,222.22	8,333.33	10,555.55
5	10	58	525,000.19	2,187.50	8,333.33	10,520.83
5	11	59	516,666.86	2,162.78	8,333.33	10,486.11
5	12	60	508,333.53	2,118.06	8,333.33	10,451.39
6	1	61	500,000.20	2,083.33	8,333.33	10,416.66
6	2	62	491,666.87	2,048.61	8,333.33	10,381.94
6	3	63	483,333.54	2,013.89	8,333.33	10,347.22
6	4	64	475,000.21	1,979.17	8,333.33	10,312.50
6	5	65	466,666.88	1,944.45	8,333.33	10,277.78
6	6	66	468,333.55	1,909.72	8,333.33	10,243.05
6	7	67	450,000.22	1,875.00	8,333.33	10,208.33

Year	Month	Period	Beginning Principal	Interest	Principal	Total Payment
6	8	68	441,666.89	1,840.28	8,333.33	10,173.61
6	9	69	433,333.56	1,805.56	8,333.33	10,138.89
6	10	70	425,000.23	1,770.83	8,333.33	10,104.16
6	11	71	416,666.90	1,736.11	8,333.33	10,069.44
6	12	72	408,333.57	1,701.39	8,333.33	10,034.72
7	1	73	400,000.24	1,666.67	8,333.33	10,000.00
7	2	74	391,666.91	1,631.95	8,333.33	9,965.28
7	3	75	383,333.58	1,597.22	8,333.33	9,930.55
7	4	76	376,000.25	1,562.50	8,333.33	9,895.83
7	5	77	366,666.92	1,527.78	8,333.33	9,861.11
7	6	78	358,333.59	1,493.06	8,333.33	9,826.39
7	7	79	350,000.26	1,458.33	8,333.33	9,791.66
7	8	80	341,666.93	1,423.61	8,333.33	9,756.94
7	9	81	333,333.60	1,388.89	8,333.33	9,722.22
7	10	82	325,000.27	1,354.17	8,333.33	9,687.50
7	11	83	316,666.94	1,319.45	8,333.33	9,652.78
7	12	84	308,333.61	1,284.72	8,333.33	9,618.05
8	1	85	300,000.28	1,250.00	8,333.33	9,583.33
8	2	86	291,666.93	1,215.28	8,333.33	9,548.61

Year	Month	Period	Beginning Principal	Interest	Principal	Total Payment
8	3	87	283,333.62	1,180.56	8,333.33	9,513.89
8	4	88	275,000.29	1,145.83	8,333.33	9,479.16
8	5	89	266,666.96	1,111.11	8,333.33	9,444.44
8	6	90	258,333.63	1,076.39	8,333.33	9,409.72
8	7	91	250,000.30	1,041.67	8,333.33	9,375.00
8	8	92	241,666.97	1,006.95	8,333.33	9,340.28
8	9	93	233,333.64	972.22	8,333.33	9,305.55
8	10	94	225,000.31	937.50	8,333.33	9,270.83
8	11	95	216,666.98	902.78	8,333.33	9,236.11
8	12	96	208,333.65	868.06	8,333.33	9,201.39
9	1	97	200,000.32	833.33	8,333.33	9,166.66
9	2	98	191,666.99	798.61	8,333.33	9,131.94
9	3	99	183,333.66	763.89	8,333.33	9,097.22
9	4	100	175,000.33	729.17	8,333.33	9,062.50
9	5	101	166,667.00	694.45	8,333.33	9,027.78
9	6	102	158,333.67	659.72	8,333.33	8,993.05
9	7	103	150,000.34	625.00	8,333.33	8,968.33
9	8	104	141,667.01	590.28	8,333.33	8,923.61
9	9	105	133,333.68	555.56	8,333.33	8,888.89

Year	*Month*	*Period*	*Beginning Principal*	*Interest*	*Principal*	*Total Payment*
9	10	106	125,000.35	520.83	8,333.33	8,854.16
9	11	107	116,667.02	486.11	8,333.33	8,819.44
9	12	108	108,333.69	451.39	8,333.33	8,784.72
10	1	109	100,000.36	416.67	8,333.33	8,750.00
10	2	110	91,667.03	381.95	8,333.33	8,715.28
10	3	111	83,333.70	347.22	8,333.33	8,680.55
10	4	112	75,000.37	312.50	8,333.33	8,645.83
10	5	113	66,667.04	277.78	8,333.33	8,611.11
10	6	114	58,333.71	243.06	8,333.33	8,576.39
10	7	115	50,000.38	208.33	8,333.33	8,541.66
10	8	116	41,667.05	173.61	8,333.33	8,506.94
10	9	117	33,333.72	138.89	8,333.33	8,472.22
10	10	118	25,000.39	104.17	8,333.33	8,437.50
10	11	119	16,667.06	69.45	8,333.33	8,402.78
10	12	120	8,333.73	34.72	8,333.73	8,368.45

APPENDIX E

DOCKET ENTRIES

(State of Michigan — Circuit Court — County of Oakland)

(LYNNE J. NICOLS, Plaintiff, v ROBERT T. NICOLS, Defendant — C.A. NO. 85-290611-DM; HON. GENE SCHNELZ (P20038))

1985	
Feb. 21.	Complaint filed
	Summons issued
	Affidav. Under Act 297 PA75 Re. Custody filed
Mar. 6.	Exparte Injunctive Order filed
Mar. 11.	Notice filed Takng. Depo.&P/S Lynn Nicols
	Appearance filed
Apr. 4.	Answer filed Complt. Div. Robert Nicols
Apr. 11.	Date Assigned for Appearance for 850529 P
Apr. 22.	Affidavit/Proof of Service filed
	Notice filed Depo.
May 24.	Notice of Hearing filed
	Motion filed Interim Contributn. Plf. Cnsl. Fee/Cst.
May 29.	Affidavit/Proof of Service filed
	Not heard
May 30.	Affidavit/Proof of Service filed
June 5.	Motion filed for Summer Responsibility of Children

	Notice of Hearing filed
	Affidavit/Proof of Service filed
June 6.	Order filed Payment of Interim Counsel Fees & Costs
June 7.	Answer filed Petn. for Summer Responsibility of Children
June 12.	Motion
June 13.	Affidavit/Proof of Service filed
June 19.	Adj.-Counsel 052985 1st S&O to Reset
June 20.	Stip/Order filed 1st Adjournment of Pre-Trial
Aug. 16.	Notice of Hearing filed
	Motion filed Cmpl. Answ. Interr.
	Affidavit/Proof of Service filed
Aug. 20.	Stip. to Answ. Interr. filed
	Order filed Answ. Interr.
Aug. 28.	Not heard
Sept. 12.	Date Assigned for Appearance for 851024 T
Sept. 18.	Notice of Hearing filed
	Motion filed Ords. Strike Dfts. Pleadgs.
Sept. 23.	Affidavit/Proof of Service filed
Sept. 25.	Not heard
Oct. 9.	Motion filed Amended/Supplmntl. Orders Strk. Dfts. Pldgs., Etc.
	Notice of Hearing filed
Oct. 11.	Affidavit/Proof of Service filed
Oct. 16.	Notice of Hearing filed
	Affidavit/Proof of Service filed

Not heard

Oct. 23. Affidavit/Proof of Service filed Mailing

Notice of Hearing filed

Not heard

Oct. 30 Petition filed More Specific Visitation

Notice of Hearing filed

Not heard

Oct. 31. Stip/Order filed Sub. Atty. Robert T. Nichols

Nov. 1. Adj.-Counsel 102485 2nd S&O to Reset, No Copies

Nov. 4. Affidavit/Proof of Service filed Mlng.

Answer filed Plf. to Dft. Petn. Specfc. Cstodl./Visitatn. Arangmt.

Affidavit/Proof of Service filed

Stip/Order filed 2nd Adjournmt. of Trial

Nov. 6. Motion

Nov. 13. Motion filed Entry of Order Re. Custody

Notice of Hearing filed

Objection filed Entry of Order

Motion filed Plf. for Entry of Ord. F/Specfc. Visitation

Nov. 20. Not heard

Nov. 21. Objection filed to Dft. Order Re. Custody

Affidavit/Proof of Service filed

Notice filed Entry of Order

Notice of Hearing filed

	Answer filed to Dft. Min. for Entry of Order
	Notice filed Presentment of Order
Dec. 2.	Appearance filed/Ntc. App. Dft.
Dec. 17.	Appearance filed/Atty. Hand/Letter
1986	
Jan. 8.	Notice filed Tkng. Depo. Duces Tecum. F/Copying Only
	Affidavit/Proof of Service filed Mlng.
Jan. 15.	Affidavit/Proof of Service filed Subpoena (9)
Jan. 16.	Date Assigned for Appearance for 860306 T
Jan. 27.	Notice filed Taking Depo.
	Affidavit/Proof of Service filed Mailng.
Jan. 29.	Petition filed for Specific Custodial Time
	Notice of Hearing filed
	Subpoena filed
	Motion filed for Protective Order
	Notice of Hearing filed
Jan. 31.	Affidavit/Proof of Service filed
Feb. 3.	Affidavit/Proof of Service filed Mailg.
	Answer filed Petn. Specfc. Custodial Time
	Answer filed Non Parties Mtn. Protectv. Ord.
Feb. 5.	Not heard
Feb. 6.	Stip/Order filed Concerng. Confidentiality of Info.
Feb. 12.	Not heard
Feb. 18.	Petition filed for Vacation Funds

	Affidavit/Proof of Service filed
	Notice of Hearing filed
Feb. 20.	Answer filed Petitn. for Vacation Funds
Feb. 26.	Motion heard, Appt. David Potts Mediator, Status Conf. 2/28/86 w/Ptys. & Children
Mar. 3.	Order filed of Mediation
Mar. 5.	Motion filed for Entry Mutual Prelim. Inj. Ord.
	Notice of Hearing filed
Mar. 7.	Order filed Consent Re. Discovery
Mar. 13.	Date Assigned for Appearance for 860414 T
	Affidavit/Proof of Service filed Mailg.
	Objection filed Entry Ord/P/S
	Notice filed Entry Order/Prpsd. Ord.
Mar. 20.	Notice filed of Presentmt.
	Order filed Paymt. Family Vacation Expenses
	Order filed Fe. Visitn.
	Objection filed to Entry of Ord. Pay Vacation Exps.
	Affidavit/Proof of Service filed
Mar. 21.	Adj.-Counsel 030686 Third S&O to 041486
Mar. 24.	Order filed Mutual Prelim. Inj. Re. Property
	Stipulation filed Entry of Prelim. Inj. Order
	Order filed Psyco. Eval./Adj. Trial Date
Apr. 18.	Date Assigned for Appearance for 860512 T
Apr. 23.	Petition filed F/Order to Show Cause
	Order filed S/C Re. Refusal Cmply. w/Court Ord. Custodial Time

Apr. 29.	Affidavit/Proof of Service filed Hand Delivery
	Answer filed Petn. F/Order to Show Cause
Apr. 30.	Motion for Visitation Schedule Granted
	Petition filed for Injctv. Relief
	Notice of Hearing filed
May 1.	Affidavit/Proof of Service filed
May 2.	Answer filed Petn. Injunctive Relief/Affid/ PS/Exh.
May 7.	Not heard
May 14.	Order filed for 3rd Adjrnmt. Trial Date
	Stipulation filed for 3rd Adjrnmt. Trial Date
	Not heard
May 22.	Date Assigned for Appearance for 860714 T 08 30
June 17.	Date Assigned for Appearance for 860714 T 08 30
July 9.	Notice of Hearing filed
	Petition filed Osc.
	Mtn./Order Show Cause filed
July 11.	Affidavit/Proof of Service filed
	Notice of Hearing filed
	Petition filed for Specific Custodial/Vacation Time
July 14.	Appearance filed/Ntc. Co-Counsel
	Affidavit/Proof of Service filed
July 16.	Not heard

July 23. Answer filed Re. Ptn. Specific Custodial/Vac. Time/Exh.

Answer filed Ptn. Ord. Show Cause

Affidavit/Proof of Service filed

Not heard

Aug. 6. Motion to Show Cause on Mtn. Re. Desk

Aug. 8. Motion Heard Re. Dependent Sons Education

Aug. 25. Date Assigned for Appearance for 860922 T 08 30

Aug. 26. Notice filed Tkng. Depo./Prod. Documents

Affidavit/Proof of Service filed Mailing

Sept. 5. Adj.-Counsel 092286 4th S&O to Be Reset

Stip/Order filed 4th Adjrnmnt. of Trial

Sept. 19. Order filed Rescinding Ord. of Mediation

Sept. 24. Petition filed Remove Dft. From Marital Home

Petition filed for Apptm. of Mediator

Petition filed for Modification of Order

Petition filed for Payment of Certain Expenses

Motion filed for Contribution to Atty. Fees/Costs

Notice of Hearing filed

Oct. 1. Stip/Order filed Subst. of Attys. for Dft.

Motion Appoint Robert Feldstein Mediator

Oct. 3. Request filed for Prod. of Documts. & Tangible Things/Etc.

Oct. 7. Answer filed Mtn. for Contribution to Atty. Fees/Costs

Affidavit/Proof of Service filed

Answer filed Ptn. for Payment of Certain Expenses

Answer filed Ptn. for Modification of Order

Answer filed Ptn. for Removal of Dft. from Marital Home

Notice filed Tak. Depos.

Affidavit/Proof of Service filed

Oct. 8. Motion heard

Oct. 9. Affidavit/Proof of Service filed

Order filed of Mediation

Notice of Hearing filed

Affidavit/Proof of Service filed Mailng.

Oct. 15. Motion for Specific Visitation Granted

Oct. 22. Notice of Hearing filed

Affidavit filed in Supt. of Pltfs. Mtn. for Contribution/Etc.

Oct. 27. Affidavit/Proof of Service filed

Motion filed for Settlement of Order

Notice of Hearing filed

Affidavit/Proof of Service filed Mailing

Date Assigned for Appearance
for 861201 T 08 30

Oct. 29. Motion heard, Plfs. Mtn. for Atty. Fees Under Advisement

Oct. 31. Motion filed Protectv. Ord./Exhbt.

Nov. 3. Notice of Hearing filed

Nov. 5. Motion filed for Ord. Compellg. Discvy./Exhibits

Motion filed for Ord.
Permittg. Evaluatn. Property

Notice of Hearing filed

Nov. 7. Affidavit/Proof of Service filed

Answer filed Motn. Protectv. Ord.

Motion filed Protectv. Ord.

Nov. 10. Answer filed Mtn. Ord. Compellg. Discovery

Answer filed Mtn. Ord. Permittg. Evaluation Property

Affidavit filed Keith Bailey

Affidavit filed Jerome C Gropman

Affidavit/Proof of Service filed

Order filed Payt. Certain Exp./Visitn. Minor Chldrn.

Nov. 12. Motion filed Settlmnt. of Ord./Exh.

Notice of Hearing filed

Motion heard

Nov. 13. Affidavit/Proof of Service filed Mlng.

Nov. 14. Notice filed Submissn. Ord./Prpsd. Ord.

Objection filed Ord. Paymt. Interim. Atty. Fees/Costs

Brief filed Suppt. Ans. Mtn. Ord. Compellg. Discvy.

Objection filed Pltfs. to Entry Order/Exhbt.

Affidavit/Proof of Service filed

Nov. 17. Affidavit/Proof of Service filed/Hand Delivery

Notice of Hearing filed

	Affidavit/Proof of Service filed
	Notice filed Entry Ord.
Nov. 19.	Motion for Entry of Order Granted
Nov. 20.	Order filed Pymt. Interm. Atty. Fees/Costs
Nov. 25.	Notice of Hearing filed Re. Ntc.
	Affidavit/Proof of Service filed
Nov. 26.	Not heard
Dec. 3.	Motion to Compel Dscvry. Granted
Dec. 4.	Adj.-Counsel 120186 Fifth S&O to Be Reset
Dec. 5.	Order filed 5th for Adjournmt. Trial Date
	Stipulation filed Adjournmt. Trial Date
	Letter filed Re. Mediation
Dec. 10.	Notice of Hearing filed Re. Ntc.
Dec. 17.	Not heard
Dec. 22.	Affidavit/Proof of Service filed
Dec. 30.	Notice of Hearing filed
	Motion filed Pltfs. for Custody/Referal to Foc.
1987	
Jan. 2.	Affidavit/Proof of Service filed
Jan. 7.	Not heard
Jan. 8.	Date Assigned for Appearance for 870202 T 08 30
Jan. 12.	Order filed Mdfyg. Vistatn.
Jan. 13.	Notice of Hearing filed Re. Ntc.
Jan. 16.	Affidavit/Proof of Service filed Hand Delivery

Jan. 21.	Affidavit/Proof of Service filed
	Answer filed Mtn. Cstdy./Refrrl. Foc.
Jan. 23.	Affidavit/Proof of Service filed Mailg.
	Objection filed Entry Ord. Re. Dispos. Mrtl. Assets
	Affidavit/Proof of Service filed Mailg.
	Notice filed Submissn. Ord./Prpsd. Ord.
	Stipulation filed Referral Foc. Re. Pltfs. Mtn. Cust.
	Order filed Referral Foc. Re. Pltfs. Mtn. Cust.
Jan. 30.	Notice of Hearing filed
	Motion filed Sttlmnt. of Ord./Exhbts.
	Affidavit/Proof of Service filed Mailing
Feb. 4.	Affidavit/Proof of Service filed Mailg.
Feb. 5.	Date Assigned for Appearance for 870306 T 08 30 AM
Feb. 11.	Not heard
Feb. 18.	Notice of Hearing filed
	Motion filed Order Compel. Discovery/Exh.
	Affidavit filed Anne Cole Peice
	Affidavit filed Robert M. Carson
	Affidavit/Proof of Service filed
Feb. 20.	Brief filed in Sprt. of Mtn. for Ord. Compel Discovery
	Answer filed to Dfts. Mtn. for Ord. to Compel Discovery
	Affidavit/Proof of Service filed Hand Delivery

Feb. 25. Motion for Entry of Order Denied

Feb. 26. Adj.-Counsel 020287 6th S&O to 300687

Feb. 27. Stipulation filed 2nd Adjmt. of Trial

Order filed 6th Adjmt. of Trial

Mar. 5. Adj.-Counsel 030687 7th S&O to 052287

Date Assigned for Appearance for 870522 T 08 30 AM

Stipulation filed Adjrnmt. Trial

Order filed 7th Adjrnmt. Trial

Mar. 10. Objection filed Entry Ord. Cmpl. Dscvry./Etc.

Affidavit/Proof of Service filed

Mar. 11. Motion filed for Protective Order

Notice of Hearing filed

Affidavit/Proof of Service filed

Motion filed for Settlement of Order

Affidavit/Proof of Service filed

Notice of Hearing filed

Mar. 12. Affidavit/Proof of Service filed

Notice filed Submission of Order

Objection filed to Entry of Order Compelling Discovery

Mar. 24. Answer filed to Mtn. for Prtctv. Ord.

Affidavit/Proof of Service filed

Apr. 20. Date Assigned for Appearance for 870529 T 08 30 AM

Adj.-Judge 052287 to 052987 by Notice

June 17.	Notice filed Tak. Depo. Duces Tecum.
	Affidavit/Proof of Service filed
June 18.	Subpoena filed
June 19.	Order filed Pymt. Taxes
July 2.	Pre-Trial held
July 6.	Date Assigned for Appearance for 870814 T 08 30 AM
	Order filed Letters Rogatory/Etc.
	Applcatn. for Ord. Letters Rogatory/Etc. filed
	Notice filed Tak. Video Depos. De. Bene. Esse.
July 8.	Notice of Hearing filed
	Motion filed Dfts. Dissolve Inj. Ord./Etc.
July 10.	Affidavit/Proof of Service filed
	Order filed Compelling Dscvry.
	Answer filed Dfts. Mtn. Dssolve. Exparte. Inj. Ord. Re. Prop. Etc.
	Affidavit/Proof of Service filed Mlng.
July 14.	Brief filed Spprt. Dfts. Mtn. for Dissolution of Inj.
July 16.	Brief filed Sprt. Plfs. Ans. Dfts. Mtn. Dslv. Exparte. Inj. Ord. Etc.
	Order filed Modfy. Exparte Inj. Ord. 2/21/85 Etc.
July 21.	Affidavit/Proof of Service filed
July 22.	Notice of Hearing filed
	Petition filed for Pymnt. of Tutor
	Affidavit/Proof of Service filed

	Notice of Hearing filed
July 27.	Affidavit/Proof of Service filed
July 28.	Deposition filed J Mollica/R Gold/J Saslone
July 29.	Motion filed Quash. Subpoenas/F/Protective Order
	Notice of Hearing filed
July 30.	Affidavit/Proof of Service filed
Aug. 5.	Pre-Trial held
Aug. 14.	Adj.-Counsel 081487 8th S&O to Reset
Aug. 17.	Order filed 8th Adjrnmt. Trial Date
	Stipulation filed Adjrnmt. Trial Date
Aug. 20.	Date Assigned for Appearance for 871016 T 08 30 AM
Aug. 21.	Adj.-Counsel 081487 8th S&O to 101687
Aug. 24.	Stipulation filed for Adjournmnt. of Trial Date
	Order filed for Adjournmnt. of Trial Date
Sept. 9.	Petition filed Remove Dft. From Marital Home
	Petition filed Pymnt. Certain Expenses/Increase Alltmnt.
	Notice of Hearing filed
	Affidavit/Proof of Service filed
	Notice of Hearing filed
Sept. 17.	Affidavit/Proof of Service filed Hand Delvy.
	Notice filed Takg. Depos.
	Affidavit/Proof of Service filed
Sept. 18.	Affidavit/Proof of Service filed Hand Delivery
	Notice filed Tkg. Depo.

Sept. 23.	Subpoena filed
	Notice filed Taking Depo.
Nov. 12.	Affidavit/Proof of Service filed
	Notice of Hearing filed Re. Ntc.
	Petition filed Amnded for Pymt. Certain Expenses/Etc.
Dec. 16.	Petition filed Spec. Holiday Vstn.
	Notice of Hearing filed
Dec. 18.	Affidavit/Proof of Service filed
Dec. 21.	Affidavit/Proof of Service filed
	Answer filed to Ptn. for Specific Holiday Vsttn.
Dec. 22.	Brief filed in Opposition Pltfs. Ptn. Visitn. Holiday
Dec. 23.	Order filed Specific Holiday Vstn.
	Motion by Plf. for Specific Visitatn. Grntd., Dft. to Remove Himself From Marital Home for Mothers Visitation
	Set for Trial 3/15/88
1988	
Jan. 4.	Date Assigned for Appearance for 880229 T 08 30 AM
Jan. 13.	Motion filed Order Compel. Discovery
	Notice of Hearing filed
	Affidavit/Proof of Service filed
Jan. 27.	Assignment Office Change 022988 Not Set, Set in Error
	Date Assigned for Appearance for 880307 T 08 30

Notice filed Taking Deposition

Affidavit/Proof of Service filed Mail

Feb. 10. Order filed Re. Subpoena Duces Tecum.

Feb. 11. Affidavit/Proof of Service filed

Subpoena filed

Subpoena filed (4)

Affidavit/Proof of Service filed/Mail.

Notice filed Take Depo./Rqst. Prdc. Dcmnts.

Feb. 18. Notice filed Tak. Depo. Duces Tecum.

Affidavit/Proof of Service filed Mail.

Feb. 22. Prf./Mailg. filed

Notice of Hearing filed

Motion filed Protective Ord. Limit Exam at Depos.

Affidavit/Proof of Service filed Hand Delivery

Notice filed Tkg. Depo.

Feb. 24. Subpoena (4) filed

Notice filed of Tak. Depo.

Affidavit/Proof of Service filed (2)

Feb. 26. Affidavit filed Anne Cole Pierce

Answer filed R Nicols to Pltfs. Mtn. Protective Ord.

Affidavit/Proof of Service filed Mail.

Feb. 29. Notice filed Taking Deposition

Affidavit/Proof of Service filed

Mar. 2. Subpoena filed

Affidavit/Proof of Service filed Mail.

Mar. 3. Affidavit/Proof of Service filed

Mar. 7. Final Disposition

Default Judgement Granted

Apr. 6. Motion filed Compel. Discovery/Sanctions

Answer filed Mtns. Remove Dft. From Home/ Etc./R Nicols

Answer filed Amended Ptn./R Nicols

Brief filed Suppt. Cross Mtn.

Answer filed Mtn. Quash Subpoena/R Nicols

Brief filed Suppt. Mtn. Quash Subpoena/Protectve. Ord.

Objection filed to Field Investgatn. Report of Foc.

Brief filed Oppose Mtn. to Quash Subpoena/ Suppt. Discovery

Affidavit filed R Carson

Affidavit filed R Nicols

Affidavit filed

Affidavit filed A Pierce

Notice of Hearing filed

Affidavit/Proof of Service filed

May 4. Notice filed Presnt. Jgm./Etc.

Affidavit/Proof of Service filed

May 10. Notice filed Presntmnt. of Jgm./Qualfd. Domstc. Relatns. Ord.

Affidavit/Proof of Service filed

May 17. Affidavit/Proof of Service filed

May 18. Motion Entry Order heard

May 25. Objection filed to Entry of Jgm.

June 15. Notice of Hearing filed

Petition filed Rstrn. Dft. Enter Home

Affidavit/Proof of Service filed

June 21. Motion filed Deter. of Specific Summer Visitn.

Notice of Hearing filed

Affidavit/Proof of Service filed

Affidavit filed Robert Nicols

Answer filed to Pltfs. Ptn. to Restrn. Dft.

June 22. Motion to Restrain Dft. from Enter Marital Home Grntd.

Order filed Restraining

June 23. Answer filed to Ptn. Restrain. Dft.

Notice filed to Police Agency

Affidavit/Proof of Service filed

June 28. Affidavit/Proof of Service filed

June 29. Notice filed Presntmnt. Jgm./Etc.

Affidavit/Proof of Service filed

June 30. Transcript filed Motion 05/18/88

Transcript filed Motion 06/22/88

Motion filed Reconsideration/Etc.

Affidavit/Proof of Service filed

Notice of Hearing filed

July 6. Affidavit/Proof of Service filed

	Brief filed Support of Dfts. Mtn. for Reconsideration
July 8.	Affidavit filed
	Affidavit/Proof of Service filed
	Answer filed to Mtn. for Reconsideratn./Vacate Entry of Ord.
July 18.	Motion filed to Intervene
	Notice of Hearing filed
July 20.	Memorandum filed by Aaragon in Supprt. Mtn. to Intervene
July 22.	Answer filed to Mtn. to Intervene
July 25.	Affidavit/Proof of Service filed
	Brief filed Oppose Mtn. to Intervene
July 27.	Petition filed Pymnt. of Certain Expenses
	Notice of Hearing filed
Aug. 3.	Affidavit/Proof of Service filed
	Motion Entry Jdgmt. Granted
Aug. 4.	Reply filed to Pltfs. Memo in Support of Ntc. of Entry
	Hearing Held 0.50 Evidentiary
Aug. 8.	Order filed Re. Restrain. Ord./Etc.
Aug. 10.	Motion Entry of Order heard
Aug. 11.	Affidavit/Proof of Service filed
Aug. 12.	Default Judgement filed of Div (26) Ntc. Sent
	Ord. filed Qualified Domestic Relations
	Subpoena Return filed
	Motion Entry of Order Granted, Jdgmt. Signed

Defense Motion Stay of Enforcement Denied

Aug. 15. Letter filed Revised Statement

Order filed Denied Mtn.

Aug. 24. Motion filed for Schopl Enrollment

Notice of Hearing filed

Affidavit/Proof of Service filed

Notice filed Take Depo.

Revised Subpoena filed

Subpoena filed

Aug. 29 Claim of Appeal filed

Motion filed for Stay Pending Appeal

Motion filed for Immediate Consideratn.

Court Reporters Certificate filed

Affidavit filed Suppt. Mtn. for Stay Pendng. Appeal/Etc.

Affidavit/Proof of Service filed

Visiting Judge P22727 L. Bruzdewicz

Defense Motion to Adjourn Hearing to 8/31/88 Granted

Defense Motion to Delay Subpoenas Granted

Aug. 31. Order filed Deny Mtn. for School Enrollmnt./ Quash Subpoenas

Response filed to Mtn. for School Enrollmnt.

Affidavit/Proof of Service filed

Court Reporters Certificate filed

Motion Enter Child in School heard

Sept. 1. Brief filed in Opposition to Pltf. Mot. for Sch. Enroll.

Sept. 8. Affidavit/Proof of Service filed

Sept. 15. Affidavit/Writ of Garnishment filed Issued

Sept. 19. Order filed Ct. of Appeals

Sept. 20. Disclosure filed

Sept. 21. Affidavit/Writ of Garnishment filed Issued (8)

Affidavit/Proof of Service filed Hand Delivery

Notice of Hearing filed

Motion filed Determ. Monies Due Plf.

Motion filed Osc. & Other Relief

Affidavit filed Lynn J. Nicols

Order filed Show Cause

Affidavit/Writ of Garnishment filed Returned (6)

Sept. 22. Affidavit/Writ of Garnishment filed Proof of Service/(8)

Disclosure filed Denying (2)

Sept. 26. Disclosure filed

Emergency Application for Leave to Appeal/Etc. filed

Sept. 27. Disclosure filed/Not Indebt/Michigan Nat'l Bank

Sept. 29. Disclosure filed

Sept. 30. Answer filed Plntfs. to Mtn. for Stay Pending Appeal

Answer filed Plntfs. to Emergency App. for Leave to Appeal

Affidavit/Proof of Service filed

Affidavit filed Mailing

Notice filed Filing Transcripts

Transcript filed Evidentiary Hrg. 3 Volumes

Oct. 3. Disclosure filed Indebted/L & L Wine/Liquor Corp.

Oct. 10. Pending Bankruptcy or Interlocutory Appeal Bankruptcy

Oct. 14. Pending Bankruptcy or Interlocutory Appeal Bankruptcy

Oct. 18. Order filed Adminis. Closing/Bankruptcy

Oct. 26. Order filed Court of Appeals

Nov. 15. Letter Filed/Attach Re. Exhbits.

1989

Feb. 1. Affidavit/Proof of Service filed/Hand Delivery

Notice of Hearing filed

Motion filed Temp. Alimony/Attach.

Feb. 8. Notice of Hearing filed

Affidavit/Proof of Service filed

Mar. 1. Notice of Hearing filed

Affidavit/Proof of Service filed

Mar. 8. Notice of Hearing filed Re.

Affidavit/Proof of Service filed

May 15. Letter Trans. From Court of Appeals filed

May 16. Sent to Court of Appeals Lansing Run Dh.

July 13. Motion filed Tmpry. Almny.

	Notice of Hearing filed
	Affidavit/Proof of Service filed
Sept. 28.	Order filed Supreme Court
1990	
Feb. 8.	Application for Leave to Appeal filed
Mar. 12.	Affidavit/Proof of Service filed
	Brief filed Supplmntl. Suppt. Applicatn. for Leave to Appeal
Nov. 5.	Returned from Supreme Court Hb.
	Order filed Supreme Court
	Order filed Court of Appeals

(Certification Omitted)

APPENDIX F

ORDER OF MEDIATION

(State of Michigan — Circuit Court — County of Oakland)

(Filed October 9, 1980)

(*LYNNE J. NICOLS*, Plaintiff, - v - *ROBERT T. NICOLS*, Defendant — C.A. NO. *85-290611-DM*; HON. GENE SCHNELZ)

At a session of said Court, held in the Court House Tower, City of Pontiac, County of Oakland, State of Michigan, on *October 1, 1986*.

PRESENT: HONORABLE GENE SCHNELZ,
Circuit Judge.

The Court having determined that the appointment of a mediator may be of assistance to the parties in reaching a settlement of the contested issues and the Court having obtained the concurrence of both counsel as to the identity of the mediator and the other provisions of this Order,

Upon the Joint Motion of Counsel for Plaintiff and Defendant,

IT IS HEREBY ORDERED that *ROBERT FELDSTEIN* is hereby appointed mediator for the purpose of meeting with the parties and their counsel in an attempt to settle all contested issues in this proceeding.

IT IS FURTHER ORDERED that the sole mediator shall not be restricted by the procedures of GCR 316.1, but may use modified procedures which, in the judgement of the mediator, would be appropriate under the circumstances of this case.

IT IS FURTHER ORDERED that upon completion of the mediation hearing, if a settlement has not been reached,

the mediator shall file a written recommendation with the Court, which recommendation may be read by the Court for the purpose of assisting the Court in understanding the issues involved.

IT IS FURTHER ORDERED that limitations as to compensation of the mediator as contained in GCR 316 shall not be applicable. The mediator shall be entitled to reasonable compensation for his or her services consistent with the mediator's experience and normal charges. No Judgment shall be entered until the mediator has been paid or arrangements for payment satisfactory to the Court or the mediator is contained in the Judgment.

APPROVED AS TO FORM AND CONTENT;
NOTICE OF ENTRY WAIVED:

Rizzy Lowenthal

_____
Circuit Judge

(*Certification Omitted*)

APPENDIX G

TRANSCRIPT EXCERPTS

(State of Michigan — Circuit Court — County of Oakland)

(LYNNE J. NICOLS, Plaintiff, v ROBERT T. NICOLS, Defendant — C.A. NO. 85-290611-DM; HON. GENE SCHNELZ (P20038))

* * *

TRANSCRIPT EXCERPT:
December 23, 1987 – Page 9

(9) [*THE COURT*]: * * * I intend this will be the first case on my non-jury term for trial. So I'd suggest that you — I talked to Mr. Feldstein who appeared before me the other day. He said you still were playing around with this mediation. Whether the mediation is done or not, we will start the trial on February the 15th at nine o'clock.

* * *

TRANSCRIPT EXCERPT:
March 7, 1988 – Pages 2-8

(2) * * * Q. Would you state your full name, please?

A. Lynne Jane Nichols.

* * *

(3) * * * Q. And Robert T. Nichols, the Defendant in this action is your husband?

A. Yes.

Q. And were you and Mr. Nichols married on August 17th, 1973?

A. Yes.

Q. And it is correct, is it not, Mrs. Nichols, that you and your husband have had two children, Jonathon (phonetic) Nichols, born February 10th, 1975, and J. R. Nichols, born October 2nd, 1976?

A. Yes.

Q. Mrs. Nichols, although you and your husband have been living in the same home during this long litigation, it is a correct statement that you and your husband have had during this time no intimate relations, no common social (4) activities, no mutual family activities, and there have been no love and affection between you?

A. Yes.

Q. Can you envision any circumstance under which you and your husband would live together again as husband and wife?

A. No.

Q. Now, you and your husband with counsel have participated in a lengthy mediation session; did you not?

A. Yes.

Q. And that proceeding ended most recently on February the 27th, a Saturday, a long early morning, late afternoon day; is that correct?

A. Yes.

Q. And during that meeting an agreement was reached; was it not, between you and your husband which was read — stated orally by the mediator to you and your husband in the presence of each other, and in the presence of your counsel?

A. Yes.

Q. At the conclusion of that statement, both (5) parties, you and your husband, each expressed your agreement to this agreement; is that correct?

A. Yes.

Q. And then the agreement was repeated by the mediator into a tape recording machine and then ultimately transcribed; is that accurate?

A. Yes.

Q. Mrs. Nichols, I have handed you that which has been marked Plaintiff's Exhibit One, consisting of a letter of transmittal from Mr. Feldstein, the mediator, and an agreement — summary of agreement, that accompanied the letter; have you had an opportunity to review that exhibit?

A. Yes.

Q. And does the memorandum of agreement which accompanies the letter, does that accurately reflect, and is it an accurate transcription of the agreement between you and your husband, with the exception of an obvious mathematical error in paragraph 4E, which has been corrected and initialed?

A. Yes.

Q. And are you asking the Court to approve this (6) agreement and make it part of and incorporate it into a judgment of divorce which is to be entered by the parties upon preparation by us and approval by Mr. Carson's office?

A. Yes.

* * *

MR. POTTS: Your Honor, it is my understanding that the parties will enter a settlement agreement separate from judgment, and it will be not part of the actual record, but copies of the agreement will be kept between the parties.

The property settlement which is essentially outlined in Plaintiff's Exhibit number One will actually be contained in a settlement, or a separation agreement.

What the witness has in her hand, which is Mr. Feldstein's first draft, after the extensive mediation proceedings, is essentially an outline, a very complete outline without some enunuciates and details that Mr. (7) Carson and Mr. Blank have agreed will ultimately be included in the settlement agreement after judgment of divorce.

We have no objection to the exhibit being received.

THE COURT: Okay. Now, the Court is satisfied there has been a breakdown in the marriage relationship to the extent the objects of matrimony have been destroyed, and there remains no reasonable likelihood the marriage can be preserved.

Therefore, I will grant to you, Mrs. Nichols, a judgment of absolute divorce dissolving the bonds of matrimony.

Other than as provided for in the proposed settlement in connection with this matter, dower will be barred, alimony barred, statutory insurance, statutory pension, statutory withholding.

I will approve what the parties have agreed to relative to custody, support, and visitation in connection with this matter.

MR. BLANK: It is understood (8) by the parties, Your Honor, that the judgment should be effective upon entry of the judgment of divorce.

The Court is not making an immediate pronouncement . . . .

THE COURT: I don't have anything before me at this time that I may do so.

* * *

TRANSCRIPT EXCERPT
May 18, 1988 – Pages 2-3

(2) * * * MR. BLANK: Your Honor, this is a hearing in connection with plaintiff's presentment of judgment of divorce and a qualified domestic relations order. The Court will recall that this case was mediated by Mr. Robert Feldstein on February 27th. That mediation resulted in a full settlement of all issues in this case. Mr. Feldstein reduced his, reduced the agreement to typing after having read it to all parties in their presence and having the parties agree to it. We appeared before your Honor on March 7th, the day set for trial. On that day the plaintiff put in her proofs in

support of the judgment. We admitted into evidence the written summary of settlement by Mr. Feldstein. It was approved by the Court and became part of the Court's order. On April the (3) 8th we as counsel for plaintiff sent to Mr. Carson the proposed documents. They were substantal. They included the judgment, settlement agreement, promissory note, QDRO, and related documents. We — last night we got the response to our proposal in writing. Prior to that time we had concluded it was necessary to move the matter forward and to file this, these proceedings to have the matter presented to the Court. We believe that our proposed judgment comports with the settlement summary as outlined by Mr. Feldstein, as approved by the parties, and as adopted by the Court. Having reviewed last night Mr. Carson's proposed changes, there are some which legitimately are questions of style. There are a few that constitute various contradicting interpretations of Mr. Feldstein's writing, and there are some new items which I believe were not part of the agreement. I did call Mr. Feldstein, the mediator, last evening. He said he was to be in the courtroom today. He said he would bring his file. It is my hope that counsel and the mediator would be afforded an opportunity this morning to use your Honor's jury room to attempt to resolve the bulk of these items — and I believe they can be resolved, at least the bulk of them. Two or three may require some interpretation by Mr. Feldstein who drafted the document which was the basis for the settlement.

* * *

TRANSCRIPT EXCERPT
June 22, 1988 – Pages 3-5

(3) * * * [*THE COURT*]: * * * And I've made that, I thought, quite clear that is the only issue to be resolved and we're waiting for Mr. Feldstein's interpretation

in relation to that mediation which this Court will ultimately resolve. (4) That's all I'm going to do. In all other respects I consider the parties and would order the parties are to comply with the terms of that judgment that was entered in relation to this matter. No further discussion in connection with it. Thank you.

MR. POTTS: Your Honor —

THE COURT: That's it.

MR. POTTS: — with all respect, and the Court knows I respect this Court, the Court is saying that I may not present our position, I mean our —

THE COURT: Absolutely not. I already told Mr. Carson that. And I explained to you why. And it makes perfect logical sense. Once the parties begin to realize that in fact there's a termination as far as this marriage is concerned and they have certain rights that they have acquired. The same thing I got upset as far as Mr. Nicols is concerned relative to this concept of the visitation. He's entitled to it. He's entitled to a good portion in relation to the visitation. I said he's entitled to it. He should have it. And I thought that was nonsense where she's concerned. It's just as much nonsense in relation to this business about moving out of the house.

MR. POTTS: Your Honor —

THE COURT: I'm not going to discuss it, Mr. Potts.

MR. POTTS: — your Honor, just may I make a (5) statement?

THE COURT: You want to read my article in Laches about making statements after the Court has ruled?

MR. POTTS: No, your Honor. I read it.

THE COURT: Thank you.

MR. POTTS: And appreciate the —

THE COURT: Thank you.

MR. POTTS: — opportunity to be present.

* * *

G-7

TRANSCRIPT EXCERPT
August 3, 1988 – Page 3

(3) * * * MR. BLANK: Your Honor, this principally as I see it is a notice, a hearing on a notice of presentment of judgment and qualified domestic relations order submitted on behalf of the plaintiff wife. A bit of history, if I could for the record: This case was submitted to mediation by order of this Court on October 1st, 1986. Robert Z. Feldstein was the named mediator. The order provides for various things including the submission of a written report from the mediator and its availability to the Court to be read. That mediation session was held, the principal portion of it, on February the 27th of this year, on a Saturday, at our office in Bloomfield, from approximately nine-thirty in the morning until after six in the evening.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Page 20

(20) * * * THE COURT: Sure. Please.

What I'd really like to try and do now, as I understand, Mr. Feldstein, in his letter of June 22nd, is supposed to have submitted a report between the two; am I correct on that?

MR. CARSON: This is the exhibit that we objected to, correct, your Honor.

THE COURT: Can we work through and find out what you are at least agreeing to between the two proposed judgments and then find out what we are disagreeing to so we can get this matter over and done with?

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Pages 26-27

(26) [*THE COURT*]: * * * And your says, "One midweek late afternoon or early evening . . . which shall include overnight visitation at which time father is responsible. Two late afternoon or early evening midweek contacts . . ." So the key difference is whether or not, when he has those midweek contacts, he has them overnight?

MR. CARSON: That's the only distinction, that's correct, your Honor.

THE COURT: Okay. Let's see what Mr. Feldstein says.

All right.

Now, that doesn't say anything about keeping them overnight.

MR. CARSON: No. It is silent, your Honor. You mean on the, of the mediation report?

THE COURT: Right.

MR. CARSON: That's correct. It is silent. And the offer of proof would be that my client maintains his understanding is that it's essentially what has gone on for the three years that the divorce has been pending. They — this is the way they've conducted themselves. This — he thought (27) they would be continuing to conduct themselves in that way. And that's how he understood it at the time, that while they would have, be living with her and not with him, and he would have them on the weekends — or I think it's every other weekend. That's his explanation for what his understanding was. Mr. Feldstein is silent as to that point or didn't include the language that we did.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Page 41

(41) * * * MR. CARSON: The third to the last line, your Honor, of our Paragraph 9.

MR. BLANK: We wish to say that she's required to consult with and, knowing the history of this case, your Honor, reaching an agreement on this matter may be very difficult.

THE COURT: Well, you know, I'll tell you. What'd they say in Mr. Feldstein's memorandum, anything at all?

MR. BLANK: No. It's just an absolute obligation for the husband to pay and —

THE COURT: There's nothing in the other. Well, I'm going to be very blunt with you. I think elective surgery is the scariest surgery known to man because it is elective. We either take it or we don't.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Page 43

(43) * * * MR. BLANK: Our judgment is just silent on the subject of the dependency exemptions as was Mr. Feldstein's memo of agreement.

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TRANSCRIPT EXCERPT
August 3, 1988 – Pages 50-52

(50) * * * MR. CARSON: Mr. Nicols says that it doesn't matter to him this year. If they think they can use it and he can't. Is that correst?

MR. NICOLS: That's what I'm saying.

THE COURT: Great. Then you can — thank you. Good. Gratefully accepted.

All right. Now, what else have we got?

MR. CARSON: That doesn't mean we consent to the whole process. I don't want to have that on the record.

THE COURT: No, I understand.

MR. CARSON: Okay.

THE COURT: Okay. Now, what else do we have?

MR. CARSON: The next one that I see is in our Paragraph 11, their Paragraph 10. It's on the same page that we're working. It's —

THE COURT: Private school expense.

MR. CARSON: — our proviso language which does not appear in theirs.

THE COURT: Well, here we go again. He wants to have "the choice of such school shall be Defendant father's." There he is, he's paying for the private school, he wants it. (51) Is that the theory?

MR. CARSON: That's correct, your Honor.

THE COURT: I think we get into that the same as I do on that elective surgery. You know, there are some private schools and there are some private schools. What about for ex — and I take — something about one of these survival schools out in California that the kid will go to high school there for nine months and live on Ewell Gibbons' juju beads and —

MR. CARSON: Post Nuts (sic).

THE COURT: Yeah. And that could be a real hassle. I would just think that the two parties will have to consent together, they're going to have to work together. They've got joint legal. They'll work together. And if there is a conflict as to where they want to send them to school, we have a dispute resolution process. Okay? That makes more sense. I don't think it should be her choice. I don't think it should be his choice. It should be a mutual choice. In the best interest of the child.

MR. CARSON: Thank you.

THE COURT: Okay?

MR. CARSON: The next point —

THE COURT: I guess, too, just so we understand what I'm doing on that one, apparently Mr. Feldstein was silent as to who chooses, and I'm just simply saying I'm going to treat (52) it. Did he say that she would —

MR. CARSON: No. He did not, your Honor.

THE COURT: Yours says in Number 10, you're silent.

MR. BLANK: Well, yeah. He uses the word "past family practices." The fact is the children —

THE COURT: Not in your proposed judgment?

MR. CARSON: Yeah. I believe his language is in there.

THE COURT: I apologize.

MR. BLANK: Yes. Yes.

MR. CARSON: I believe the "past family practices" clause is a modifier of the expense.

THE COURT: I would just assume that — of the, that's paying for the expense?

MR. CARSON: That's correct, your Honor.

THE COURT: That would be my gut reaction. But if they're going to have joint legal, they're going to have to make joint decisions.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Pages 62-63

(62) * * * THE COURT: Yeah. Why don't we move off it and let's talk about — you can take a few minutes to at least discuss it among yourselves. Obviously it's important to everybody. Okay? Where are we at next?

MR. CARSON: The next is our 13, their 12.

THE COURT: All right. That's alimony.

MR. CARSON: And one, two, three, four, five, six lines down in ours, is that correct, the word, we have the word "material".

THE COURT: Line 6.

MR. CARSON: In the middle of that line we have the word "material," in 13.

(63) THE COURT: I don't like the word "material".

MR. CARSON: Well, wait till you read the consequences of this. I don't think you'd like the concept of de minimis either, your Honor.

THE COURT: Okay. ". . . default is not cured . . ."

So the — it accelerates it, is that what it boils down to?

MR. CARSON: No. This is the — it's an alimony reopener for her, your Honor, and it's in the event of an uncured default. And I didn't want this situation — I don't believe anybody meant to agree to a de minimis thing. There's a default as a cure. You miss a payment. That's material. But it's the concept of immaterial, it's a huge consequence for an immaterial —

THE COURT: Well, I guess I'm having trouble. What would be — ". . . default is not cured . . ." What other default could there be other than not making the payments or keeping it insured or what have you? Just tell me. Help me with that. Give me a for instance.

MR. CARSON: Well, the property settlement obligations involve a number of things relating to restrictions on the incumbering of the assets, those kinds of things. If it's payment, I don't have trouble with it. If it relates to any of the mechanics that are set forth herein aside from payments, I have trouble.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Pages 85-110

(85) * * * THE COURT: It makes me worried when I say "and other miscellaneous personal property," based on the arguments to this point in time.

MR. CARSON: Okay. My understanding is that he takes what's in the den, he takes his bedroom.

THE COURT: And I assume everything in that bedroom.

MR. CARSON: Right. He then — if there's anything else that they want and we submit a list, it's either agreed to or not agreed to. If it's agreed to, he has thirty days from the date of entry to make arrangements —

THE COURT: By personal effects, do you mean art objects, for example? I guess — because that's one that always seems in the past to create problems. Obviously. —

MR. CARSON: The way this was handled at the genesis —

(86) MR. NICOLS: We don't have expensive art objects.

MR. CARSON: — the way this, the way this was, the genesis of this was, so far as I recall, Feldstein said to us, "Look, as to anything else that you might want, go through the house, give them a list, see if you can agree on it. If you can't agree on it, then use the Court to resolve it." It was not his understanding, by the way, it's not our understanding — correct me if I'm wrong — that this is going to be a major moveout of stuff. She's essentially supposed to get everything else except for some miscellaneous personal things that he wants. That's the context of it.

THE COURT: Okay. What are we talking about when we talking personal? For example, I've seen personal, art objects are one that sometimes can become extremely personal. Family albums, photo albums, that type of thing can become very personal.

MR. CARSON: That's possible.

THE COURT: Movie films. That type of thing can become very personal. He mentioned his VCR, for example, which was a gift to him. Items that may be constituted as gifts. What are we talking about when he means personal? What does he have in mind when he says personal? I guess we'll start with that.

MR. CARSON: I really think it was the kind of things that you just enunciated. It's not that he's going to walk through the house and that they're going to, he's going (87) to take a table and she's going to take a table or he's going to take a lamp and she's —

THE COURT: I understand all that.

MR. CARSON: It's those kinds of things. In fact, one of the examples that I think was used by the mediator was — I mean, if you have seven television sets, you're not going to want one. I think that was one of his examples. But

they were the miscellaneous personal things that are in the house.

THE COURT: Well, you're not going to want a broken TV.

MR. NICOLS: No.

MR. CARSON: No. He wants the one that works.

MR. NICOLS: No. It doesn't matter. What — I guess what I'm trying to say is personal things such as items that I had in my apartment before I got married.

THE COURT: What is that?

MR. NICOLS: Well, like —

THE COURT: Go ahead. Take your time. Now's the time, you know.

MR. NICOLS: Like a chest.

THE COURT: Pardon?

MR. NICOLS: A chest.

THE COURT: Okay. What kind of chest are we talking about? I mean, like one that sits on top, like a jewelry chest?

MR. NICOLS: No. It's like a large chest.

(88) THE COURT: Like a cedar chest or something like that?

MR. NICOLS: Yeah, it's like a — it's being used now as like a dining chest but it's not really. It's a chest like for books.

THE COURT: Any problems? No problem at all.

MR. NICOLS: Yeah. And the chair that was with it, an antique chair.

THE COURT: Chair that's with it. No problem at all.

MR. NICOLS: Yeah. And —

THE COURT: That's into furniture. That's not — that's why we're talking about it. Okay?

MR. NICOLS: Yeah. Appreciate it.

THE COURT: And by the way, when the Court is saying "no problem at all," I am looking to Mrs. Nicols and she is saying, "Yes," with no problem. Correct me if I'm wrong, okay?

MR. NICOLS: And possibly in some proportion we have probably eighty pieces of outdoor furniture, some proportion.

THE COURT: Eight-oh?

MR. NICOLS: Yes. Maybe sixty, eighty.

THE COURT: She says, "No, you don't have eight-oh," or "No, he can't have any"?

MRS. NICOLS: No, there's not eighty, and no, I (89) don't think that's personal property or something he had when he came into the marriage.

THE COURT: What particular piece would you like?

MR. NICOLS: I would like — like there's three tables to eat outside, you know, with umbrellas. I would like maybe one.

THE COURT: Three table/seats with umbrellas?

MRS. NICOLS: No. No. There's two.

MR. NICOLS: I'm sorry.

THE COURT: There's two.

MR. NICOLS: Two.

MRS. NICOLS: There's one by the —

MR. NICOLS: And then there's probably two, four, six, eight, ten, twenty-five or thirty chairs. I'm saying like maybe, you know — umbrella set with four chairs, maybe two lounge chairs. One of the lounge chairs was a present of mine, another present.

THE COURT: Okay. Well, let's take that one first. There's a lounge chair that was given as a present to him. Do you know which one it is?

MRS. NICOLS: No, I don't ever recall —

THE COURT: Was it for Father's Day or something?

MR. NICOLS: I think so.

THE COURT: Can you identify it any more specifically?

MRS. NICOLS: I know what chair he's talking about, (90) but it was not — 'cause it's the only lounge chair we had and it's the one he always sat in, but it wasn't a gift.

THE COURT: Do you mind if he takes the one he always sat in?

MRS. NICOLS: No.

THE COURT: She doesn't mind. You can have the family lounge chair. What about the umbrellas? You've got two of those. You need both sets?

MRS. NICOLS: No. I think that's — well, one is down by the pool and one is up on the deck, and they're —

THE COURT: Okay. One's on the deck and one's by the pool.

MRS. NICOLS: Maybe some outdoor chairs, sitting chairs?

THE COURT: Apparently — are we talking foam chairs?

MR. NICOLS: No. These are like steel chairs. They're like very expensive.

MR. BLANK: Here again —

THE COURT: My wife and I found out a long time ago to just buy K-Mart every year. It works out better. You see, then you don't have any difficulty.

MR. BLANK: I feel the flavor was that he was going to get office furniture and bedroom furniture and personal effects.

THE COURT: That's what we're trying to find out, (91) what does he mean by personal effects. Mr. Blank, we're never going to be closer than right now, so I would just as soon do it, you know. Just saving on the portal to portal pay is a great idea, you know.

MR. NICOLS: I think out of —

MR. CARSON: Well, it says miscellaneous personal property.

MR. NICOLS: — fifty or sixty outdoor pieces of furniture, I certainly could get some.

THE COURT: You want some chairs?

MR. NICOLS: Yeah.

THE COURT: Is there any way you could identify with any specificity so that I can at least make —

MR. NICOLS: Well, like maybe one set of four chairs, like bouncy chairs that are one of the decks with some tables.

THE COURT: What is he — do you know what he's talking about? You haven't the slightest idea.

MRS. NICOLS: Yes. Yes. I know what he's talking about.

THE COURT: Does this create a problem and spoil the entire —

MRS. NICOLS: Yes, it does, and it's just, you know, one room — is this what we're going to do with every room?

THE COURT: Well, I don't know. We're starting in, we're seeing.

(92) MRS. NICOLS: Well, I just — this was not part of the agreement, that —

THE COURT: Well, that's what was vague. It was called "miscellaneous personal property."

MRS. NICOLS: He has got deck furniture out in Aspen, in that Aspen home, that far exceeds anything we have on Covington, plus I knw he's got new lawn furniture out on his house on Vaughn. There's no need for this other than to disrupt our house.

THE COURT: Why don't you take the personal lounge chair and we'll forget about the other right now?

What else are you talking about in personal? What other personal items are we talking about? Is there any tools that you have that were your tools?

MR. NICOLS: There's a lot of tools, but it's part of the house.

THE COURT: Well, what are we talking about? I mean, like a band, skill saw or a band saw?

MR. NICOLS: No. I mean like garden tools.

THE COURT: Is there any particular — I don't know. Did you do shop work or anything like that, or drill, electric drill or anything like that? Is there anything else? I mean, I don't want to pressure you. I want you to take all the time in the world, Mr. Nicols.

MR. NICOLS: No.

(93) MR. CARSON: Pictures or albums or —

MR. NICOLS: No. Just some, you know, 'cause anything you ask for —

MR. CARSON: No. Now's the time.

THE COURT: Now's the time.

MR. NICOLS: Well, I think this way here, like there's eight chairs on one terrace and there's five chairs on another terrace and there's sixteen on another terrace down below. You would think at least I could get a few of those chairs, you know. I don't understand.

THE COURT: Well, let's, for the sake of the argument, say at least you're not. Now, what else did you want? At least you're not. But tell me — but don't get hurt feelings. I'm just at this point in time trying to ferret it out. Maybe we'll come back and revisit it. I don't argue with you. Maybe we'll come back and look at it. If that's all we're talking about.

MR. NICOLS: No. I mean silver, crystal, everything goes with the house.

THE COURT: You're sure of that?

MR. NICOLS: Yes.

THE COURT: There's no special pieces, your mother's or your father's or anything like that at all?

MR. NICOLS: No.

THE COURT: There was a family piece that you —

(94) MR. NICOLS: No. They're her mother's or I mean grandmother's, whatever.

THE COURT: Nothing you want at all?

MR. CARSON: Any other art?

MR. NICOLS: Well, I had a lot of gifts from her grandmother of Waterford china. It belongs half to me, but, you know, each year she would give a gift of two glasses, one for each of us. But —

THE COURT: You're not making a claim to that?

MR. NICOLS: No.

THE COURT: Is there anything else?

MR. NICOLS: No.

THE COURT: So under the personal items we have a chest and two chairs and his favorite lounge chair on the patio.

MR. BLANK: One chair, I think it was. Chair with the chest.

THE COURT: Oh, I'm sorry. One chair and chest. I apologize. I'll go back again. I'm sorry. One chair and a chest, and a lounge chair. And that's all the personal property you're talking about?

MR. CARSON: No. He says out of twenty-nine, obviously, that he wants, I mean, something, other outdoor stuff. But other than that, that's —

THE COURT: No, I'm just —

(95) MR. CARSON: Yes.

THE COURT: At this point that is all we have definitely —

MR. CARSON: That's all we've accumulated as I walk through the house, that's correct. Plus everything in the den, everything in his bedroom.

THE COURT: Is it illogical, then, if he wants a few of those chairs down on the deck to give him a few chairs?

MRS. NICOLS: Well, there's not twenty-nine. That's an exaggeration.

THE COURT: Well, he didn't want twenty-nine.

MRS. NICOLS: Well, I know, but he's exaggerated how many chairs there are.

THE COURT: Okay.

MRS. NICOLS: He makes it sound like I've got all this furniture.

THE COURT: I don't even know what kind of chairs we're talking about that are worth —

MR. NICOLS: They're all iron chairs, they're probably worth a hundred and fifty dollars apiece.

THE COURT: Oh. They're iron? You mean wrought iron?

MR. NICOLS: No, iron, like they're real heavy-duty chairs.

THE COURT: They're made with metal tubing?

MR. NICOLS: No. They're like — they're not (96) wrought iron, but they're like painted iron. And then they have like straps for seating.

THE COURT: How many of those you got?

MRS. NICOLS: Well, I've got eight sitting chairs, a table with four chairs, and a table with four chairs down on the pool, with four lounge chairs down by the pool.

THE COURT: And that's — what about the other chairs he says you have floating around?

MRS. NICOLS: Well, that's all that's there. That's it. And it would cost me a lot to replace those.

THE COURT: I'm not arguing that. I'm just trying to figure out. He says there's a whole bunch of chairs and —

MR. CARSON: Well, the count now is twenty and twenty-nine.

MR. NICOLS: Wait a minute. I'll tell you exactly. There's — on the pool deck there's eight chairs.

THE COURT: On the which deck?

MR. NICOLS: Pool deck.

THE COURT: Pool deck.

MR. NICOLS: Eight chairs.

THE COURT: How are they described? Are they these same iron chairs?

MR. NICOLS: No. Those are different chairs. Eight chairs and a table on the pool deck.

THE COURT: How would you describe those?

(97) MR. NICOLS: Those would be like fiberglass chairs.

THE COURT: Are they folding?

MR. NICOLS: No.

THE COURT: Fiberglass. Just fiberglass.

MR. NICOLS: Fiberglass with metal. Like —

THE COURT: Are they molded, molded unit?

MR. NICOLS: No. Yeah. They're like lounge chairs.

THE COURT: Wait. Wait. Wait. Wait. I'm having — is it — when I say molded, it's like cast as one mold, and it's — we have a few of those — they're maybe seven dollars apiece.

MR. NICOLS: No. They're like, they're expensive. And then, so there's, on that deck there's eight chairs. On another —

THE COURT: Is that right, Mrs. Nicols?

MRS. NICOLS: Yes. Four lounge and four seating chairs.

THE COURT: Four lounge, four seating, good heavy metal chairs?

MRS. NICOLS: They're more of a lightweight metal, but, yes, they're good quality.

THE COURT: All right.

MR. NICOLS: And then on another deck outside there is five chairs, four sitting chairs and one lounge chair.

THE COURT: And that's the lounge chair you're (98) getting?

MR. NICOLS: Yeah.

THE COURT: What are the four other chairs?

MRS. NICOLS: They're on the other deck, and there's a table with four chairs around that. And it all matches, it's all matching.

THE COURT: Is that the same one you're talking about?

MR. NICOLS: Yes, um-hum.

MRS. NICOLS: It's all matching sets.

THE COURT: It's a matching set there. Okay. Now —

MR. NICOLS: Now, on the other deck there's —

THE COURT: How many decks do you have?

MRS. NICOLS: That's all. That's it.

MR. NICOLS: No. There's three decks.

THE COURT: He says there's a third deck.

MRS. NICOLS: I don't know about the third deck.

MR. NICOLS: There's three decks. On the other deck there's four sitting chairs plus four at a tble chair, which is eight more. So there's eight, sixteen —

THE COURT: Pardon?

MS. LOWENTHAL: That's what she just described to you.

MRS. NICOLS: That's what I just described to you. (99) We're just talking about the same thing.

THE COURT: Oh.

MR. NICOLS: And then there's tables combined — there's probably, there's probably total, thirty-five to forty pieces.

THE COURT: Thirty-five to forty pieces. You don't think so?

MRS. NICOLS: Well —

THE COURT: Why don't we do this 'cause we're probably going to be back here tomorrow. Why don't you make a list of every chair that's there with a description of it and —

MR. NICOLS: And tables.

THE COURT: — and tables. And then we'll look at that list and he can add to it or subtract from it.

MR. CARSON: I think there are also pictures, your Honor, that they might be able to bring.

THE COURT: I thought I asked them about that. What other pictures, what pictures did you want?

MR. CARSON: Well, no, I'm saying just to identify the decks and their chairs.

THE COURT: Oh, there are pictures?

MR. NICOLS: Possibly. I don't recall.

THE COURT: Do you have any pictures of them?

MR. NICOLS: Well, he has all the family albums.

THE COURT: I'm sorry. Are there pictures?

MRS. NICOLS: Well, he has all the family albums. (100) He took them.

MR. NICOLS: No.

THE COURT: You don't have the albums?

MRS. NICOLS: Well, they're gone then.

THE COURT: Okay. Well, make a list and let's see where we're at. And he can think overnight if there's any other —

MR. NICOLS: Okay. I'll think about it.

THE COURT: Why don't you do that? You think overnight, Mr. Nicols, of any other personal items so you're not pressured in relation to that. Okay?

MR. NICOLS: Yeah.

THE COURT: All right.

Now, we're down to the big money item, is that correct?

MR. CARSON: That's correct, your Honor.

THE COURT: All right. Now, I have a couple thoughts. And let's see if I can — under the property settlement in Mr. Feldstein's original document, we start in with A. Do you start in with A, both of you, under the property settlement? Apparently not.

MR. CARSON: Yes, I believe we do, your Honor.

THE COURT: Oh, is A it then?

MR. BLANK: A's the house.

MR. CARSON: A's the house.

THE COURT: Okay. Let us just go through and see if (101) we have agreed — now, I guess — I'll be very frank with you. It would seem to me — this is not a commitment or judgment or order or anything else, but the Court, in discussing this — we have really two alternatives. You follow precisely what was set down in Mr. Feldstein's property settlement. That's what we have on the one hand. And that is what is incorporated one hundred percent in your judgment, am I correct on that, Mr. Blank?

MR. CARSON: I don't believe that's correct.

THE COURT: Okay. A good portion of it?

MR. CARSON: Yes, I believe —

THE COURT: Incorporated in the judgment?

MR. CARSON: — I think a lot, one very significant money issue is not.

THE COURT: Okay. Well, I guess I'm trying to first ballpark where we're at.

MR. CARSON: Right. That's the only reason I'm trying to point out as we go through.

THE COURT: No problem. I want you to do that. I'm just trying to say. We then have a proposal basically incorporated in Mr. Blank's proposal with some serious exceptions. Okay.

MR. CARSON: Correct.

THE COURT: The major stumbling block apparently is, however, the amount of money that is to be paid out. Is that to be paid out in the form of alimony? Just as part of the (102) property settlement?

MR. BLANK: Property settlement.

THE COURT: A large block of money. There is a definite dichotomy between what plaintiff and defendant say was agreed to. Mr. Blank is saying, "This is what Mr. Feldstein has said. We've tracked him." Mr. Carson is saying, "Wait a minute." And I got this out of Mr. Blank's statement, so you correct me if I'm wrong, Mr. Carson, his opening statement today is that, "No, they are reducing it by thirty-five percent because of tax consequences in connection with this so that we're really only going to get sixty-five percent," and then a couple other changes in that regard.

MR. CARSON: We are addressing it as deductible, that's right, and it's the format that we use for deductibility. But the principal issue is are they deductible and includable or are they —

THE COURT: Okay. It would just seem to me — and, again, I'm just thinking out loud — that if in fact we were to take your position, we're going to have to go back over and re-evaluate the entire property settlement because you've now reduced the value of the estate. I — what I'm talking about is when we try to decide now what we're going to do and how we're going to proceed, whether we should go item by item on property as we did before and we'd be really wasting our time if in fact there is something major that has to be changed, (103) and I just want to have a path in my own mind. If — I'm going to make this real simple — if we were dealing with an estate that had one thousand dollars in it, okay, and it was to be divided fifty/fifty, that would mean each person would get five hundred dollars. Right?

MR. CARSON: Correct.

THE COURT: Okay. I don't know what percentile you ultimately worked out in relation to this or even if there was a percentile.

MR. BLANK: Never was reduced —

THE COURT: Never was reduced to percentile. Did Mr. Cunningham in his explorations, in his assistance ever discuss in terms of a percentile, to try and reduce assets to a percentile of some nature?

MR. CARSON: No. They gave value as to assets.

THE COURT: All right. Well, if they gave a value and we added it all up according to the value status that they gave it, would we have a percentile?

MR. BLANK: It would be impossible, I think, your Honor, because there was not — argreement was not reached on several other assets, whether they were includable, non-includable, what their value was. Mr. Cunningham didn't value every asset.

THE COURT: That's a problem. But let me just go back to my principle then. If we said there was a thousand (104) dollars and we're going to divide it fifty/fifty, they'd each get five hundred dollars. If one person came along later and said, "Wait a minute. In that thousand I've got to take away two hundred and fifty dollars because it doesn't work out in order for tax consequences and everything else," you don't take the two-fifty off the — if it was the husband, for example, making the claim — you don't take the two-fifty off the wife and the wife now gets two hundred and fifty dollars and the husband gets five hundred. You say, "No, we've got an estate worth only seven hundred and fifty dollars," and we divide that in half on a fifty/fifty basis and they each get three-seventy-five. Do you understand what I'm saying to you?

MR. BLANK: I understand what you're saying.

THE COURT: If you're going — looking at this thing, it's not going to come off of one side. It's going to come off

the top if there in fact is a problem, and then it will be divided. That's why I was kind of hoping you'd had a percentile in connection with it because it might have made it a lot easier.

MR. CARSON: Well, I don't mean to speak for Mr. —

THE COURT: Can't we get some numbers assigned to however the matter was ultimately agreed to so we have some concept? Do we have a handle on what the total estate was before you began dividing it?

MR. CARSON: Your Honor, just from our standpoint, and I think from theirs, we never came to an agreement on (105) asset values. And we never came to an agreement with respect to how this settlement affected either a percentage of the estate or how they affected any particular value for any particular asset. What we did is we just moved concepts back and forth until we thought that the parties had agreed to a transfer of assets, either immediately or over time, which satisfied them regardless of how each side came to that conclusion. Is that —

MR. BLANK: Absolute fair statement.

THE COURT: So if —

MR. CARSON: So we can't unscramble it.

THE COURT: I understand. I'm not — I guess once you break the egg, it's hard to put the yolk back together, you know. But I guess that what we're then talking about is — and again, when I say this, it's just the Court thinking out loud and exploration and not findings or anything like that, and I hope it doesn't indicate, "Gee, this is what I'm going to do." I don't mean to imply that — then what we're saying is that Mrs. Nicols thought she was going to get X amount of dollars —

MR. CARSON: Gross.

THE COURT: — and — well, I guess —

MR. CARSON: I didn't mean to characterize that as —

THE COURT: — is she going to have to pay tax — is she going to have to pay tax on it or not?

(106) MR. BLANK: She has to pay tax on only the income from it. That's correct.

THE COURT: All right. On the principal, she would not have to?

MR. BLANK: That's correct.

THE COURT: So she thought she was going to get an X number of dollars principal.

MR. BLANK: She's awarded property settlement.

THE COURT: I understand. And now she's being told that she's going to get Y in principal?

MR. BLANK: Well —

THE COURT: And Mr. Carson's position is, "Well, she should have understood that when we said we would give X dollars we really meant Y because we intended to take the tax consequences."

MR. BLANK: Well, then the obvious answer's so why didn't they say Y?

THE COURT: I'm not arguing. I'm just trying to find out if that's where we're going.

MR. CARSON: Under the laws that exist, characterizing it as alimony or property isn't determinative. It's whether it's deductible. And my, the exact counter to why didn't we say it is, well, why didn't they say it's not deductible? The word "deductible" doesn't appear, either "deductible" or "non-deductible." That's not to say that they were not legitimate —

(107) THE COURT: The big issue is which one of Mr. Feldstein's, cash payout for husband, is that the one? Which one is it?

MR. CARSON: It breaks down into several categories, but if you're only talking about the deductibility, it's all cash.

THE COURT: Okay. Which one did we, which one is it?

MR. CARSON: It's —

MR. BLANK: There are three cash payments.

THE COURT: Just tell me which one it is.

MR. CARSON: They're all at issue, your Honor.

THE COURT: I have no problem.

MR. CARSON: The four-forty, the one-seventy-five, and the one million.

THE COURT: He's got it A, B, C, and D.

MR. CARSON: Oh, I'm sorry, your Honor.

THE COURT: That's all I'm asking.

MR. CARSON: It's C and D.

THE COURT: C and —

MR. CARSON: C and D.

THE COURT: C and D.

MR. CARSON: The deductibility issues are in C and D. There are other sub issues that have financial impact within those also.

MR. BLANK: And also the attorney fees section.

(108) MR. CARSON: Right. That's C, isn't it?

MR. BLANK: No.

MR. CARSON: No. I'm sorry. Then it's C, D, and — it's all cash, so it's C, D, and — what is it? Number 12, Mrs. Lowenthal says.

THE COURT: Oh, attorney fees — okay, 12.

All right. Now, let's just start in here at the top and start in with C. Mr. Feldstein says, "Cash —" And this was read to the parties, right? "Cash payout from Defendant-Husband of Four Hundred and Forty Thousand Dollars to be accomplished with a payment of Fifty Thousand Dollars forthwith upon entry of the Judgment of Divorce and with the balance of Three Hundred and Ninety Thousand to be satisfied by Mr. Nicols with a payment of One Hundred Thousand within sixty days from date of entry of Judgment and a payment of One Hundred and Ninety Thousand within one hundred and eighty days of date of Judgment." Let me just add that up. Does that add up?

MR. CARSON: No.

MR. BLANK: No. There was a mathematical error there. It should have read two-ninety. It was changed in the exhibit.

THE COURT: So it's two-ninety?

MR. BLANK: Right.

THE COURT: So it should be one hundred thou — so (109) he's supposed to pay really as follows: Fifty thousand, a hundred thousand, and two hundred and ninety thousand.

MR. CARSON: Unless they want to reduce the four-forty to three-forty.

THE COURT: All right. So how is that disputed? Where is what we don't understand?

MR. CARSON: Okay. There are a few things. First, if you look at their C and our C —

THE COURT: Okay. Just a second.

MR. CARSON: — Number 1 —

THE COURT: Let me just find it. Now, you want me to look at their C first?

MR. CARSON: It's Page 10 and Page — of ours, and Page 9 of theirs.

THE COURT: Okay. Just a half a second.

Okay. All right. Let me just read yours and then read theirs. Just give me a moment. I'll read it to myself, okay?

MR. CARSON: Sure.

(The Court is reading to himself)

THE COURT: Well, now, as I see this dispute — let me make sure I understand it — both of them are different from —

MR. CARSON: Yes.

THE COURT: — Mr. Feldstein's. Correct?

(110) MR. CARSON: Well, there are sub issues within this, that's correct.

THE COURT: I understand. But you both agree that there's different, they're both different from Mr. Feldstein's?

MR. BLANK: Correct.

THE COURT: Now, you, Mr. Blank, want to give him a credit for three thousand six-seventy-five-eighty-eight, which apparently represents what you say to be the differ-

ence between what his payment to Internal Revenue would be — I guess I don't remember what the order of June 19th, '87 was. Can somebody refresh my memory.

MR. CARSON: We both agree on the concept. The amount, I think, is up in the air. We were ordered to pay a portion of her taxes. We paid not only that portion, we paid more with an understanding —

THE COURT: Wasn't there a discussion on who was hired and what there was —

MR. CARSON: No. And we agreed. And we paid that.

THE COURT: No. No. I'm back on June of '87. I'm just trying to remember.

MR. CARSON: The question was, was she an employee, she received a paycheck, the taxes, but she also had a business, and remember, and we're supposed to pay the penalties and interest and some was withheld — regardless of who was right, wrong, or indifferent at that point, we did pay it.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Pages 113-116

(113) * * * THE COURT: All right. Now — and we sure aren't going to do it by guess and by golly. Now, the next problem we have is there's another five thousand representing prior contributions toward Plaintiff-Wife's attorney fees and thirteen thousand representing the balance and interest due on the Manufacturers Bank loan referred to in Paragraph 18-J hereof. Now, that I don't know anything about. Let's take the five thousand. You're saying you should, he's had to pay previously five thousand dollars.

MR. CARSON: That's correct.

THE COURT: And you want a credit for it here.

MR. CARSON: Right.

THE COURT: You don't want a credit for it on the attorney fee, you want —

MR. CARSON: Take it any way you want it, but we want the credit for it.

THE COURT: Do you think he's entitled to credit or not?

MR. BLANK: No, absolutely not.

THE COURT: Okay. Just tell me — I have no problem — just tell me. I'm not arguing with you. I just am trying to find out. Where is the paragraph that talks about attorney fees?

MR. BLANK: In Mr. Feldstein's or in our judgment?

THE COURT: Yours it's 12, it's 12 in Mr. Feldstein's.

(114) MR. BLANK: It's —

THE COURT: It says "as his full and final contribution towards counsel" fee. So does that contemplate another five thousand, the five thousand having been paid previously or not?

MR. BLANK: The five thousand dollars was paid three years ago. Three years later we bargained and he's going to pay a hundred and seventy-five, no mention is indicated in the agreement that he's to be given credit and the payment is only one hundred and seventy. If he was to make the payment of a hundred and seventy, that's what we would have bargained for.

THE COURT: And you argue on what, Mr. Carson?

MR. CARSON: Our point is that his full shot that he's supposed to pay throughout this case is one-seventy-five. He already paid five. That's it. I mean, that's the simplistic approach. We had an order that contemplated when he was originally making the payment that it would be taken into consideration. That's — I have nothing more to say about that. It's not covered just like this other credit wasn't covered. I don't want to make that —

THE COURT: It's — I guess the argument is that the interpreting of the language "full". Does the order in which

I ordered it say at the time he shall be given credit at any final?

MR. CARSON: It says, "It is further ordered that (115) the payment by the defendant, Robert T. Nicols, of such interim counsel fees and cost contribution shall be taken into consideration by this Court at the time of property settlement, at disposition of other issues in this action."

THE COURT: So it was contemplated, which I usually order anyway. I always do. I always do.

MR. CARSON: Yes. I think that's correct. And let me just reference this for the record.

THE COURT: We had another time — oh, no, yeah, excuse me, give the date on that.

MR. CARSON: I believe it's November 18, 1986.

THE COURT: Now, I don't want to add fuel to fire, but wasn't there a big discussion that one other time on that twelve thousand dollars?

MR. CARSON: No, there was a much bigger discussion, your Honor. There was an order for additional interim, and I think it was much greater, fifty-five thousand dollars or something like that.

MR. BLANK: It's still outstanding.

MR. CARSON: It was outstanding because we came back in and we said, "Your Honor, we don't have free assets, we'll have to sell marital assets." We couldn't agree on which marital assets — that's how —

THE COURT: I just remember there was some —

MR. CARSON: But you were correct, your Honor, there was another time that it was approached.

(116) MR. BLANK: And if he wishes to press for the credit for the five, we would press for the payment of the outstanding order for fifty or thereabouts and add it to the one-seventy-five. The whole point was the one-seventy —

THE COURT: The principle's still the same, though, Mr. Blank. It's either a credit or not a credit. I don't like the language "full and final." If you'd just said his final pay-

ment, we wouldn't have any problem. If you'd just said his full payment, we wouldn't have any problem.

MR. BLANK: I would say this in addition. We did consult with Mr. Feldstein about this issue in your Honor's jury room. He said that his impression was that there would be no credit given.

MR. CARSON: Well, your Honor, one, I'd like Mr. Feldstein here if we're going to go through what's going on.

THE COURT: No argument.

MR. CARSON: But the second thing is that is not the issue that governs this entire hearing. The issue is what did the parties have in mind when they thought they made the agreement? Is there a meeting of the minds? If so, what is it? My client's position, quite clearly, as he's conveyed it to me is he believed when he paid originally that it would be taken into consideration. He believed when he agreed to make the contribution it consistently would be taken into consideration. That's what was in his mind.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Page 120

(120) * * * THE COURT: All right. He's giving her the personal property but she's liable for the balance due on it.

MR. CARSON: It's a debt that — yes, it's a debt that's not treated specifically in the memorandum is where we are at, I think, isn't it?

THE COURT: Is it ever treated anywhere else, the fact that there's a balance due on the personal property? Under the personal property that's listed, do they say she should get it free and clear of any debt?

MR. CARSON: I believe it says he's supposed to indemnify her and hold her harmless. At least that's — I can go back to this, your Honor. I believe he's supposed to pay and hold her harmless.

THE COURT: If he's supposed to pay, then he's paying — then theoretically he'd be paying twice, wouldn't he? He'd be paying there and here? Which is what he's supposed to do?

MR. CARSON: It's silent as to that.

THE COURT: Then if we were to accept the thirteen-thousand argument, then we would be going back looking at the personal property and saying he's really not giving her all of it. She's paying for thirteen thousand dollars of it herself.

* * *

TRANSCRIPT EXCERPT
August 3, 1988 – Page 125

(125) THE COURT: Let's just forget the interest for a moment and — oh, I'm not saying, I'm not ruling, I'm not making any ruling. I want you to understand this completely.

MR. CARSON: Okay.

THE COURT: All we're trying to do is test the various positions of the parties by exploring them, and that way I can get a better feel for where we're going.

* * *

TRANSCRIPT EXCERPT
August 4, 1988 – Page 178

(178) * * * Q. (Continuing, Ms. Lowenthal): Mr. Feldstein, with regard to the language in that paragraph, is it your understanding that the parties agreed that Mr. Nicols was to also be able to include the repayment of debt?

A. No. I don't see any deduction for debt, no.

Q. Okay. With regard to the Vaughn Road premises and the remortgaging, do you have a recollection as to whether or not there were, Mr. Nicols had any restrictions

with regard to mortgaging or remortgaging the Vaughn Road home?

A. Yes, there were restrictions.

Q. Do you recall those restrictions?

A. I'd have to look at these notes.

Q. Would you, please?

A. Yeah. There was an injunction that had been agreed upon, a restraint that the parties agreed to. It's incorporated within Paragraph 6 on the fourth page of my lengthy memorandum.

* * *

TRANSCRIPT EXCERPT
August 4, 1988 – Page 184

(184) * * * Q. Okay. As you read your memorandum, would you say that this is an artfully drafted complete understanding for a transaction of this scope?

A. I would say without any undue defensiveness that it is singularly complete for what it purports to be, and that is —

Q. Oh, I don't quarrel with that.

A. — a recap of a mediator at six o'clock P.M. on a Saturday following nine hours of discussion back and forth in what is admittedly something more than a garden variety divorce action. Do I contend that this represents some, as you put it, artful, exhaustive, dotting-every-eye, crossing-every-T treatment of this case? Of course not. And it could not have been such an instrument given the time constraints we faced.

Q. I don't dispute that.

Could it be — would it be normal that this kind of document could have been the operative documents to convey the property, establish the criteria for discounting in detail, etcetera, or did it contemplate finished documents to accomplish the transaction itself?

A. If I understand your question, surely this was not intended to serve exclusively. This obviously had to be accompanied by your attention and the other attorneys' attention to a lot of matters.

* * *

TRANSCRIPT EXCERPT
August 4, 1988 – Pages 188-189

(188) * * * Q. (Continuing, Mr. Carson): There's a moveout date in your notes. Do you recall that?

A. Yes, I do.

Q. And what was the date?

A. Without looking down at the file in front of me, I think it was May 1, '88.

Q. You're correct. Do you recall how that was arrived at?

A. By the same way that every other one of these twenty or forty or eighty things was arrived at, by the mutual agreement of the parties painstakingly achieved during that lengthy Saturday.

Q. Do you remember it being arrived at as a date that would have been a point in time well subsequent to the entry of the judgment?

(189) A. I don't recall that, but in fairness to the thrust of your question, I will tell you that I think that we all impliably believed that this judgment would be entered by May 1st. After all, we achieved this agreement in late February.

Q. I'm asking whether you recall a specific discussion about that around the table in the conference room towards the, as one of the last few issues?

A. I honestly don't.

Q. Okay. No trouble.

By the way, this four-forty payout, you did the math for the fifty, the one-ninety, and the one hundred, I think is —

A. I again did that without looking at the notes but —

Q. Fifty, one-ninety, and one hundred add up to three-forty. That's what your notes say. Your notes say four-forty, then fifty, one-ninety, one hundred. Could it be that it's an error and should have been three-forty or do you believe it's an error in one of the progress payments?

A. I am positive that it was four-forty and I'll tell you why. Even though as I'm looking you're quite correct that the total of the initial fifty and the other two payments I mentioned said three-forty —

* * *

TRANSCRITP EXCERPT
August 4, 1988 – Page 203

(203) * * * Q. (Continuing, Mr. Carson): Are you clear in your mind when that discussion took place? Is it possible that the discussion that you just recapitulated did not take place in February but took place in May in the jury room?

A. That is possible. And if you would let me look through some notes, I could tell you more than possibly but in fact whether or not it took place, I think, that it took place in — thank you very much — whether it took place in May as opposed to initially.

I'm sorry that I can't be more helpful than that. I thought my notes might let me pinpoint at just which session it took place. Let me simply say this. It is possible that you're correct and it took place at the May '88 jury room conference we all conducted. As I reflect on this hard, I honestly think it took place at both meetings. I think it was an issue of concern to us in both arenas.

* * *

TRANSCRIPT EXCERPT
August 4, 1988 – Page 210

(210) * * * THE COURT: It's 9, 9 on his. I apologize. It's 9 on his. Where it talks about that, under a format to be furnished, fashioned by Joseph Cunningham. And then Paragraph 13 of Mr. Feldstein's, Paragraph 13 of Mr. Feldstein's. Obviously there it expands upon what Mr. Cunningham is to do, and that is he is, in the event of any acceleration in payment, there will be a discount to present value. And I would say that would obviously apply — if it applies under a penalty, it obviously applies under a volunteer payment because other than that, the individual would be punished for making a volunteer payment and it would be to his advantage to then default because then he would be getting the advantage of a reduction to present value. So there's no question in my mind that the interpretation of 9, under a format to be fashioned constitutes the present value determination. And we can get that one out of the way.

* * *

TRANSCRIPT EXCERPT
August 4, 1988 – Page 214

(214) * * * MR. CARSON: It is on, it's Paragraph Number 5, your Honor, in the middle of that paragraph.

THE COURT: Paragraph 5? Thank you.

Didn't he end it January 31st, '88?

MS. LOWENTHAL: No.

THE COURT: Isn't that part of his testimony today? That they didn't know, you didn't know any more at that time when you were doing this in February?

MR. CARSON: Yes. My understanding of his testimony was that it was for the contribution for the fiscal year ended January 31, 1988, the exact amount of which was unknown at that time. So —

THE COURT: Mr. Blank or Ms. Lowenthal?

MS. LOWENTHAL: He also stated that at the time that that was done it was contemplated that the judgment would be entered very quickly, not six months later.

THE COURT: I don't care. We're going back in time.

* * *

TRANSCRIPT EXCERPT
August 4, 1988 – Page 235

(235) * * * THE COURT: Well, he's got to make a lot of other payments, you know, as a practical matter. I don't know what all his assets are. I don't have that before me. I'm trying, what I'm trying to do is go through this agreement and do what you, what everybody said you were going to do on the first of March, and that is clean up any dichotomy as far as any language in connection with it. I'm not trying to rebuild nor am I entering a judgment. I'm trying to be practical and arrive at a conclusion to this thing.

* * *

TRANSCRIPT EXCERPT
August 4, 1988 – Page 245

(245) * * * THE COURT: Why don't we not use the term "proper". Let's just say ordinary marketing activities unless specifically authorized to the contrary by the Court. Just ordinary would be better than proper. By that I'm contemplating that we list it with a realtor and try multi-listing, we do the standard thing. Okay? What else?

MR. CARSON: I believe the last change or discrepancy is on Page 23 of defendant's and it would have appeared on Page 20 of plaintiff's in the middle of the continuation paragraph that's on the top of Page 23 of —

THE COURT: Okay. Top of Page 23.

* * *

TRANSCRIPT EXCERPT
August 5, 1988 – Page 253-254

(253) * * * BY MR. CARSON:

Q. Good afternoon. Would you state your name for the record, please?

A. Lynne J. Nicols.

Q. And you're the plaintiff in this action?

A. Correct.

Q. How old are you?

A. Thirty-nine.

Q. And did you have any formal education after high school?

A. Yes.

Q. And what was that?

A. College, the University of Michigan.

Q. Did you receive a degree?

A. Yes, in business administration.

Q. And did you have any education beyond your bachelor's degree?

A. I've had some classes in graphic art and drawing.

Q. I'm sorry?

A. And drawing.

Q. Anything other than that?

A. No, not that I can recall.

Q. Do you recall the mediation procedure for this case?

(254) A. Yes, I do.

Q. And it took place on February 27th, is that correct?

A. Correct.

Q. And were you there?

A. Yes.

Q. Do you recall the mediator reciting an agreement or terms?

A. Yes.

Q. And did you hear those terms?

A. Yes.

Q. And did you express your concurrence with those terms?

A. Yes.

Q. Did you hesitate before that?

A. Not that I can recall, no.

Q. So you expressed your concurrence without hesitation?

A. Yes.

Q. And what procedure did you understand would follow from that concurrence?

A. That the attorney, I think it was decided my attorneys would go back and write the first draft of the judgment and that it would be presented to you for revisions or, you know, collaboration — I don't know the proper term, but to go over it and see that it was in agreement with you. And then be entered.

* * *

TRANSCRIPT EXCERPT
August 5, 1988 – Page 273

(273) * * * Q. Do you recall the mediator dictating the terms of an outline of a proposed settlement at the end of the mediation?

A. Yes.

Q. Do you recall your agreeing to those terms?

A. I think after a fashion. My comment was "Do I have to sign anything?" and I think you answered, "No." I says, "Then I guess it doesn't matter" because Mr. Feldstein was leaving for a vacation and he wanted it over with.

Q. Did you ask for more time when you were asked to —

A. Yes. I asked for — it was Saturday at six o'clock. I had no accountants available. My entire life has been run by bookkeepers and accountants. I literally can't add four and four so, consequently, I said, "Can I have one day with

my accountant, that I would bring the person in on a Sunday to go over it?" He said, "I'm going on vacation. You've got one or two minutes. Talk to your attorney." That was the extent of it. And everyone here heard it.

Q. And then you concurred?

A. Yes.

* * *

TRANSCRIPT EXCERPT
August 5, 1988 – Page 295-296

(295) * * * Q. (Continuing, Mr. Carson): Mr. Nicols, what did you understand to be the procedure that would be followed after the mediation hearing on the 27th?

A. You would do a draft, my attorney — Mr. Blank would do a draft, submit the drafts to each other's attorney and see if that was what was agreed on or what, you know, what was assumed to be agreed on.

Q. And when did you think this would have been — by "this" I meant the judgment. When did you think this would be effective?

A. Probably thirty days after if it was a meeting to (sic) the minds — I mean ninety days after — I thought approximately three months if the minds, if it was, you know, if both minds (296) agreed to what was in the document or assumed what was in the documents, it would have been about probably three months after. But when I saw the documents, I just, I couldn't believe it.

Q. Mr. Nicols, at the time you were considering agreeing to the payments, was your circumstance with your business associates on your mind?

A. Absolutely. I brought it up to Mr. Feldstein.

Q. Okay. And what circumstance was that that you were troubled —

A. I was troubled because I said, you know, "What if my —" I said to Mr. Feldstein, and I don't want to speak

because's not here to clarify it, but I said, "What happens if my income is zero?" He said, "Well, that's no problem." He said, "You file bankruptcy and then you go ahead and ask for a, you know, the Judge will give you alimony." That's why he inserted alimony in the agreement.

* * *

TRANSCRIPT EXCERPT
August 5, 1988 – Page 319

(319) * * * [*MR. CARSON*]: * * * Pursuant to the Court's request, we followed a somewhat unusual procedure in having the defendant also prepare a proposed judgment and having it reviewed by the mediator and then we've had these hearings. The Court, during this discussion, these hearings, has pointed out that, on numerous occasions, that plaintiff's draft falls short of what I believe to be, have been the understanding of the parties. And on that basis alone, I believe that we're at a point in time where the motion of the plaintiffs must be denied.

* * *

TRANSCRIPT EXCERPT
August 5, 1988 – Page 328-330

(328) * * * [*THE COURT*]: * * * There was some dispute as to the meaning contained in the memorandum of Mr. Feldstein; considering the manner and time in which it was drafted and the extensive proceedings that had gone before, the Court is not surprised, shocked, or find in any way unusual. And I think that the polishing that the Court has done in regard to it with the modification of some of the terms and the interpretation of some of the language was both necessary, proper, and nothing that is exceptional.

* * *

(329) * * * In the opening remarks, Mr. Carson, you asked some questions. You in essence said, "Was there a memorandum, was it agreed to, and now, in essence, what does it mean?" I think it's a good summation. You argue that it was only a memo, a contemplated agreement by counsel on language. And I think that's a fair statement too, a very fair statement. You argue then to the contractual conception as to the meeting of the minds, whether there in fact was a contract. You know, this is an interesting area of the law. There are a number of opinions that have been written just recently in connection with this with the effect of a mediation, the effect of acceptance of a mediation, how binding is it, when can it be set aside, those type of things. I think you may be right when you get down into contract. Was there a meeting of minds? Was there a contract? I don't know. I'm not going to make a ruling one way or the other in that regard but I don't think that is an illogical (330) approach. There is a court rule that's involved in connection with this as to the new mediation statements, but we really don't have that here because this is not a mediation as such that the mediator said, "This is my recommendation" and the parties can accept or reject. That is not what happened in this particular regard.

* * *

TRANSCRIPT EXCERPT
August 5, 1988 – Page 333

(333) * * * [*THE COURT*]: * * * Those matters were, in fact, questions of interpretation, questions of language, meaning, and the Court has interpreted it and gone through it and we have done that. The parties themselves, apparently, couldn't agree. The Court has assisted in that regard. The Court is not making the agreement. The Court is assisting in clarifying what that agreement is.

* * *

TRANSCRIPT EXCERPT
August 5, 1988 – Page 338

(338) * * * Now, the Court hasn't gone through and analyzed each case. I think that each case can be cited for the propositions they were cited for. I think the facts of this case will determine it. And the facts are very simply this — and again, to repeat myself and to distill now what I've said and that is simply this, the parties, after extensive discovery, after extensive conversation, after extensive effort, met, mediated the matter, a resolution was arrived at in relation to it, it was dictated in the form of the agreement, it was contemplated, based upon the statement of both counsel in relation to this, that there are nuances that would have to be decided. And the Court has resolved those nuances prior to entry of the judgment. It could have been easily done after the entry, but since there was a dispute and the parties themselves could not agree to it, the Court has now adjudicated and entered and a, decisions relative to those nuances.

* * *

TRANSCRIPT EXCERPT
August 10, 1988 – Page 345-347

(345) * * * MS. LOWENTHAL: Of the lined draft that you're looking at. There is language added at the bottom of the large introductory paragraph regarding the Court making certain findings, etcetera. I have been informed by their office that they are requesting language inserted there indicating that it would be without the consent to the procedure by the defendant. And we're objecting to that, your Honor, because this is a judgment. Their objections are of the record, not necessarily part of the judgment. They've made their objections on the record. They will make them again today, I suppose.

THE COURT: I guess my problem is I'm trying to remember what the objections were to the proceedings. I thought the motion initially was a motion to not allow — I thought the agreement was that it was a motion on both sides and ultimately I resolved it. It was a motion of both the plaintiff (346) and the defendant. They both had motions, and the hearing was in connection with those motions. So I guess when you say you didn't consent to the hearing, I'm having a little trouble on that.

* * *

MR. CARSON: I think the record's clear. What we want it to say is we don't want the judgment to indicate that it's a consent judgment. We objected obviously —

THE COURT: Well, it's not a consent, nobody could say it was a consent judgment.

MR. CARSON: We took the position that there is, had not been an agreement amongst the parties. Everything that we argued last week —

THE COURT: Why don't we scratch out "the parties having reached certain agreements?" The record will reflect whatever occurred on the record.

MR. CARSON: That's fine, your Honor.

THE COURT: And just have "the Court having made certain findings". Okay? That's the easiest way. That's what you're really worried about, Mr. Carson?

(347) MR. CARSON: That's correct. Thank you, your Honor.

THE COURT: You don't want to agree to anything.

MR. CARSON: Right.

* * *

TRANSCRIPT EXCERPT
August 10, 1988 – Page 358

(358) * * * MR. CARSON: But what I'm saying to the Court is if the Court is entering this judgment at all

over our objection, if it is, it's based upon a finding of a binding agreement. And the addition of terms which were not agreed to would not be appropriate, I believe.

* * *

TRANSCRIPT EXCERPT
August 10, 1988 – Page 364

(364) * * * MR. CARSON: Okay. Then for purposes of the entry tomorrow, your Honor, we again object. I just want to renew it on the record that there was no agreement and also that this did not follow the now-current — then-current mediation rule, which I think would have specifically addressed this circumstance, which provides that if there is an understanding, it has to be both reduced to writing and signed by the parties. In fact, that did not take place. I'd like the record to reflect that, your Honor.

* * *

TRANSCRIPT EXCERPT
August 12, 1988 – Page 3

(3) * * * THE COURT: Counsel has clearly stated they don't agree to anything and that this is done under protest, in essence. Am I correct on that?

MS. PIERCE: Yes, your Honor, and I will elaborate on that for just a moment.

THE COURT: Okay. Are you going to say anything that hasn't been said before?

MS. PIERCE: Just for the record very briefly, your Honor, we would like to make it very clear that we are opposing the entry of this order. We believe it's based on an unenforceable agreement. We believe that the procedure utilized clearly violates the court rule on mediation for domestic relations orders, Domestic Relations 3211 MCR. We do not want to, by having cooperated with the Court, have it appear for the record that we agreed to the procedure.

THE COURT: I think I've made that clear that that didn't happen.

MS. PIERCE: So we ask that you not enter the judgment or the QUADRO.

* * *

APPENDIX H

FELDSTEIN MEMORANDUM
NICOLS, LYNNE v. ROBERT – MEDIATION

(State of Michigan — Circuit Court — County of Oakland)

(Memorandum of Agreement Reached February 27, 1988)

TO: Nicols v. Nicols – Mediation
FROM: RZF
February 27, 1988

Mediation Hearing in captioned matter.

Present are Lynne J. Nicols, Plaintiff and her counsel, Charles E. Blank and Betty L. Lowenthal, as well as Robert T. Nicols, Defendant and his counsel Robert M. Carson and Anne Cole-Pierce.

Agreement reached after negotiations conducted with both litigants and their respective counsel involves the following:

1.) *Custody/Visitation/Support/Medical*

Plaintiff and Defendant will jointly be awarded the legal care and custody of the two minor children with physical custody awarded to Plaintiff-Mother and liberal visitation privileges extended Defendant-Father to include the following:

Every other weekend from Friday after school to Monday morning at which time father will be responsible to accompany the children to school;

One mid-week late afternoon/early evening contact for dinner during each week that there is overnight weekend visitation;

Two late afternoon/early evening mid-week contacts for dinner during weeks when father does not have the described overnight weekend visitation;

One-half (½) of all of the "longer" school vacation periods of Christmas, Easter, mid-winter break, if any, and a disproportionately favorable portion of the summer vacation period (if the Cranbrook school system has a 13 week summer, father is to receive seven weeks and mother six weeks);

Father will also be alternating and/or sharing all other major civil and religious holidays.

Defendant-Father will pay to Plaintiff-Mother through the Oakland County Friend of Court child support of $200 per week for each of the two minor children commencing forthwith upon entry of Judgment and continuing until the children have attained the age of 18 or graduated from high school, whichever shall last occur or, in exceptional circumstances, until the further Order of the Court; Father will receive those abatements which the Friend of Court and/or Michigan Supreme Court child support guidelines furnish for any continuous periods for overnight visitation.

Father will also be paying for the reasonable and necessary medical, dental, hospital, orthodontic, optometric, prescription drug and hospitalization insurance expense for the minor children during their described further minority.

2.) *Private School Expense*

Father will be responsible to assume and pay in accordance with past family practices the private school expenses for the youngsters through their completion of high school.

3.) *Alimony*

No alimony will presently be awarded Plaintiff or Defendant, alimony is reserved for Plaintiff only in the event of Defendant-Husband's default on property settlement obligation hereinafter created, no alimony is reserved for Defendant-Husband and the same is forever barred.

4.) *Property Settlement*

The Plaintiff-Wife will receive the following assets, benefits and things of value:

A. The marital residence commonly designated as 1155 Covington, Birmingham, Michigan, subject to the outstanding mortgage obligation thereon which Wife shall assume and pay according to its terms and for which she shall hold harmless and indemnify Mr. Nicols from liability; this presumes that Defendant-Husband will have brought current any and all mortgage, tax, assessment and/or other encumbrances or liens for the property as a date of entry of Judgment.

B. Contents in and about 1155 Covington, Birmingham, Michigan, inclusive of furniture, furnishings, accessories, appliances and art objects excluding Mr. Nicols' office furniture and bedroom furniture which he will be removing and retaining upon departure (which vacating of the marital home will take place on or before May 1, 1988). In this regard Defendant-Husband will supply Wife's counsel within a week or so with a list of whatever items of personal property he seeks to remove and retain and if necessary by reason of failure of agreement by the parties on this issue the Court or Friend of Court can be addressed with brief oral argument for a dispositive ruling.

C. Cash payout from Defendant-Husband of Four Hundred Forty Thousand ($440,000.00) Dollars to be accomplished with a payment of Fifty Thousand ($50,000.00) Dollars forthwith upon entry of the Judgment of Divorce and with the balance of Three Hundred Ninety Thousand ($390,000.00) Dollars to be satisfied by Mr. Nicols with a payment of One Hundred Thousand ($100,000.00) Dollars within 60 days from date of entry of Judgment and a payment of ~~One~~ [*Handwritten: Two*] Hundred Ninety Thousand (~~$190,000.00~~) [*Handwritten: $290,000.00*] Dollars within 180 days of date of entry of Judgment.

D. A payment of One Million ($1,000,000.00) Dollars over and above the aforedescribed cash payments to be satisfied via monthly payments of Eight Thousand Three Hundred Thirty-Three and $^{33}/_{100}$ ($8,333.33) Dollars, plus five (5%) percent interest thereon, until satisfied in full.

E. 1984 Volkswagen automobile.

F. Any and all other personal property in the possession or under the control of Plaintiff inclusive of her clothing, jewelry, bank accounts, personal effects and the like.

The Defendant-Husband will receive the following assets, benefits and things of value:

A. The entirety of business interests participated in by Defendant-Husband specifically including L&L, RTN, Tyfield and R&M, subject in all instances to any and all outstanding obligations related thereto which Defendant shall assume and pay according to their terms and for which he shall hold harmless and indemnify Wife from any liability.

B. Palm Beach Construction Company and/or its related residential premises popularly designated at 695 Vaughn Road, Bloomfield Hills, Michigan, similarly subject to any and all outstanding obligations thereon which Defendant shall assume and pay according to their terms and for which Wife shall be held harmless and indemnified from liability and further subject to the injunctive restrictions hereinafter set forth by reason of security considerations for Wife's property settlement entitlement.

C. Residential premises situated in Aspen, Colorado, similarly subject to any and all outstanding obligations thereon which Defendant shall assume and pay according to their terms and for which Wife shall be held harmless and indemnified from liability.

D. 1973 Mercedes Benz, 1979 Mercedes Benz and 1984 Saab automobiles subject to any and all outstanding encumbrances thereon which Husband shall assume and pay according to their terms and for which Wife shall be held harmless and indemnified from liability.

E. CIS Equipment Trust 1984-B subject to any and all outstanding encumbrances thereon which Husband shall assume and pay according to its terms and for which Wife shall be held harmless and indemnified from liability.

F. Any and all contents situated in and about the Aspen, Colorado residence.

G. Merrill Lynch or other brokerage account contents subject, however, to a provision hereinafter incorporated relative to the appointment of a Receiver with respect to tracing and account-

ability of bonds and other securities under described circumstances, but specifically including for Defendant-Husband some Three Hundred Thousand ($300,000.00) Dollars of bonds currently believed to be in existence in his possession or under his control.

H. Any and all other personal property in the possession or under the control of Defendant inclusive of his clothing, jewelry, bank accounts, personal effects and the like.

5.) *Profit Sharing Account*

With respect to the L&L Wine & Liquor Corp. Restated Profit Sharing Plan, Forty-Three Thousand ($43,000.00) Dollars "off the top" will be utilized for repayment of Defendant-Husband's loan balance thereagainst and the balance, currently estimated to be Two Hundred Twenty-Five Thousand ($225,000.00) Dollars plus an undetermined amount for contribution made during fiscal year ending January 31, 1988 will be equally divided by and between the parties with Plaintiff-Wife receiving her one-half (½) of One Hundred Twelve Thousand Five Hundred ($112,500.00) Dollars or thereabouts, plus one-half (½) of as-yet-undetermined recent contribution being provided her by a QDRO to be contemporaneously entered with the Judgment of Divorce.

6.) *Land Contract Receivable*

Defendant-Husband is to be awarded and retain land contract receivable having been represented to have a current approximate balance of Six Thousand Two Hundred Fifty ($6,250.00) Dollars.

7.) *Unregistered Securities*

The Judgment will provide for the appointment of a Receiver who will be entrusted with the task of the

tracing of any and all bonds, unregistered securities or other such instruments on the part of Defendant-Husband during the past pendency of this cause and with Husband being subject to the responsibility of accounting for the transformation of these bonds or other securities into other identifiable marital assets hereinbefore dealt with, or alternatively, accountable for the expenditure of the funds realized from the sale of these bonds or securities for legitimate household, family or business expenditures to the extent that his ongoing income could not reasonably provide for same; in the event that the Receiver shall ascertain the existence of "unaccounted for" bonds or securities, then and in that event the Husband shall have a duty of reimbursement to Wife of one-half (½) of such unaccounted for bonds or securities over and above Three Hundred Thousand ($300,000.00) Dollars of bonds hereinbefore alluded to and awarded to Husband as his sole and separate property.

8.) *Injunctive Restriction Relative to Palm Beach/Vaughn Premises*

The Judgment will provide that Defendant is restrained from subjecting the Vaughn Road premises and/or the corporation related thereto to any further indebtedness, encumbrance or liability until such time as Plaintiff-Wife has received the Four Hundred Forty Thousand ($440,000.00) Dollar payout due her as hereinbefore described and Plaintiff's counsel have received the One Hundred Seventy-Five Thousand ($175,000.00) Dollar contribution towards fees and costs as hereinafter described. In this regard Defendant-Husband shall have the right to mortgage the subject premises provided that any and all excess funds over and above those due for the present balance on mortgage of Eight Hundred Sixteen Thou-

sand ($816,000.00) Dollars or thereabouts and Three Hundred Thousand ($300,000.00) Dollars of contractors' bills or thereabouts are provided to Plaintiff-Wife in partial satisfaction of the balance of the Four Hundred Forty Thousand ($440,000.00) Dollar initial property settlement payment due her.

9.) *Partial Distribution To Wife For Future Sale Of Husband's Business Interests*

In the event that Defendant-Husband shall sell L&L or Tyfield, then and in that event he shall provide Defendant-Wife with one-fourth (¼) of his net after-tax receipts therefrom which shall apply against the One Million ($1,000,000.00) Dollar property settlement entitlement due Wife, under a format to be fashioned by Joseph Cunningham, C.P.A. of the accounting firm of Plante & Moran, with the end result to be, of course, that after appropriate credits are imposed the annual obligation will be less than One Hundred Thousand ($100,000.00) Dollars per year as would have been the case prior to the sale of such business interests.

In the event that payments due Plaintiff-Wife or her counsel in the initial respective sums of Four Hundred Forty Thousand ($440,000.00) Dollars and One Hundred Seventy-Five Thousand ($175,000.00) Dollars are not timely paid in accordance with the described schedule, the Court shall have a Receiver forthwith sell the Vaughn premises related to Palm Beach Construction Corporation for the highest available price and out of the first net sales proceeds all of the initial Four Hundred Forty Thousand ($440,000.00) Dollars or any balance due thereon, and the initial One Hundred Seventy-Five Thousand ($175,000.00) Dollars for attorney fees and costs or any balance due thereon

shall be fully accelerated and satisfied out of such sales proceeds, with the balance of all such sales proceeds to become the property of Defendant-Husband.

10.) *Insurance*

Defendant-Husband will be obligated to continue to maintain, either individually or through any corporate entity presently paying the premiums for, life insurance on his life in a minimum of Fifty Thousand ($50,000.00) Dollars with the two minor children designated as irrevocable beneficiaries thereon until such time as each of the children shall have attained the age of eighteen (18) or graduated from high school, whichever shall last occur, with Defendant to provide Plaintiff on an annual basis with confirmation of the existence of the coverage and verification of the premium payment; additionally the statutory insurance language would be included in the Judgment.

11.) *Further Clauses To Be Incorporated In The Judgment*

A. Dower.

B. Execution of Necessary Documents.

C. Retention of Jurisdiction clause whereby the Court can oversee the enforcement but not the modification of the terms and provisions of the agreement.

12.) *Attorney Fee/Expert Witness Fee/Cost Contribution*

Defendant-Husband will pay to Wife's counsel the sum of One Hundred Seventh-Five Thousand ($175,000.00) Dollars as his full and final contribution towards counsel/expert witness fees and Court costs with one-third (⅓) of this sum to be paid 60

days from date of entry of this Judgment and two-thirds (⅔) of the sum to be paid within 180 days of date of entry of Judgment.

13.) Inadvertently not cited above is the fact that the Judgment would contain a provision providing for an acceleration of the One Million ($1,000,000.00) Dollar property settlement entitlement due Plaintiff-Wife upon 30 days written notice with a 45 day cure period thereafter, with delinquent interest accruing at the rate of ten (10%) percent per annum on any amount then delinquent, with an additional proviso that in the event of an acceleration in payment there will be a discount to present value, any dispute to be resolved by Joseph Cunningham, C.P.A. or his successor.

14.) In view of the fact that the Mediator is not aware of any formal support Order being currently in full force and effect, it is presumed and insisted upon that the parties will continue the present status quo until the Judgment has been prepared and entered, with Mr. Nicols continuing to provide such financial assistance as has been ongoing during the pendency of the cause.

15.) Mediator will submit a Statement to respective counsel together with this recapitulation and each party will be obligated to forthwith satisfy one-half (½) of same.

16.) Counsel have, in view of the agreement fashioned and the imminent preparation and entry of an appropriate Judgment, concurred that discovery proceedings can be terminated and the Court advised through its Clerk of the fact that March 7, 1988 will no longer have to be occupied by a trial of this cause.

APPENDIX I

MOTION FOR REHEARING

(State of Michigan — Court of Appeals)

(Dated December 4, 1989)

(LYNNE J. NICOLS, Plaintiff-Appellee, v ROBERT T. NICOLS, Defendant-Appellant — Court of Appeals No. 111262; Oakland Circuit Court Case No.: 85-290611-DM, Hon. Gene Schnelz)

NOW COMES the Defendant-Appellant herein, ROBERT T. NICOLS, by and through his attorneys, CARSON FISCHER POTTS AND HYMAN, and moving this court for rehearing of its decision in the above-entitled matter states:

1. On November 15, 1989, this court filed its *per curiam* opinion in this case.

2. This Court appears to have predicated its decision on the factual assumption that the trial judge had "found that the parties had agreed to a settlement of the case and that a sufficient 'meeting of the minds' had occurred". *Per Curiam Decision*, Page 2.

3. Defendant-Appellant submits that the language quoted in the preceding paragraph is a misstatement of fact in that the trial court appears to have found, in passing, that "(t)he parties themselves, apparently, couldn't agree" and that "there was a dispute and the parties themselves could not agree to it, the court has now adjudicated and entered . . . decisions relative to those nuances". Transcript of Evidentiary Hearing on Entry of Judgment, August 5, 1988, Pages 333 and 338.

4. While there is some language in the transcript of the hearing of August 5, 1988 to the contrary, this Court

should conclude from a fair overall reading of that transcript that the trial court did not find that the parties had finally agreed to a settlement of the case prior to the hearing.

WHEREFORE, the Defendant-Appellant, respectfully moves this Honorable Court to grant rehearing as to the decision previously rendered herein, to vacate the judgment of the trial court entered below, to remand this action to that court for trial and to grant such other or further relief as this court shall deem just and equitable.

Respectfully submitted,

CARSON FISCHER POTTS AND HYMAN
By: /s/ Robert M. Carson (P11682)
Terry S. Givens (P14029)
Attorneys for Defendant-Appellant
300 E. Maple Rd., 3rd Fl.
Birmingham, MI 48009

Dated: December 4, 1989

APPENDIX J

MCR 3.208(B)

(B) Default Cases.

(1) The practice in default cases must comply with MCR 2.603.

(2) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course upon the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.

(3) If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the judge presiding at the hearing.

(4) If it later appears inappropriate to have a judgment entered, the court shall direct that the judgment fee be returned to the person who deposited it.

(5) If the proposed judgment later appears inappropriate, a modified proposed judgment in accordance with the court's opinion must be presented within 14 days.

Supreme Court, U.S.
FILED
MAY 16 1991
OFFICE OF THE CLERK

(2)

No. 90-1732

In The

Supreme Court of the United States

October Term, 1990

ROBERT T. NICOLS,

Petitioner,

v.

LYNNE J. NICOLS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

- AND APPENDICES -

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No. 90-1732

In The

Supreme Court of the United States

October Term, 1990

ROBERT T. NICOLS,

Petitioner,

v.

LYNNE J. NICOLS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

The account of proceedings set forth in petitioner's pleadings have not been accepted by any Michigan Court as a correct statement of facts. Respondent asserts the following is a correct view of the factual and procedural posture of this case.

Respondent's complaint for divorce, filed in 1985, sought dissolution of a 15-year marriage involving custody of two minor children, and millions of dollars of marital property. After years of pre-trial discovery, the trial court appointed attorney Robert Z. Feldstein as mediator. The *stipulated* order of mediation, entered October 1, 1986, provides:

> "Upon the Joint Motion of Counsel for Plaintiff and Defendant,
>
> IT IS HEREBY ORDERED that Robert Feldstein is hereby appointed mediator for the purpose of

meeting with the parties and their counsel in an attempt to settle all contested issues in this proceeding.

IT IS FURTHER ORDERED that the sole *mediator shall not be restricted by the procedures of GCR 316.1, but may use modified procedures which, in the judgment of the mediator, would be appropriate under the circumstances of this case.*

IT IS FURTHER ORDERED that upon completion of the mediation hearing, if a settlement has not been reached, the mediator shall file a written recommendation with the Court, which recommendation may be read by the Court for the purpose of assisting the Court in understanding the issues involved." (Petitioner's Appendix F) (Emphasis supplied)

There were several preliminary meetings between counsel and the mediator (Tr 206). On February 27, 1988, a Saturday, all counsel and their clients met with Mr. Feldstein (Tr 147). During that eight-hour session (Tr 148), the parties reached agreement on all issues (Tr 149). In the presence of both respondent and petitioner, and their attorneys, the mediator recited the terms of the agreement on dictating equipment (Tr 149) and inquired of each party whether they understood the settlement and agreed to its terms. In the presence of all, the mediator recorded the assent of each party to the agreement (Tr 150).

The mediator transcribed the agreement and submitted the six-page report recapitulating the terms of the settlement exactly as had been dictated, writing to the trial judge that there was "full agreement as to all issues in dispute" (Respondent's Appendix A, A-1).

That same day petitioner's counsel telephoned respondent's attorney requesting renegotiation (Tr 4).

Nevertheless, within a few days, petitioner's attorney reported his client would abide by the agreement (Tr 5). On March 7, 1988, the case was scheduled for trial and respondent's attorney reported to the judge the case had been settled (Tr 3/7/88, 2).

Petitioner was not present in court on that date. He later testified he had a business meeting (Tr 298). Respondent testified to the routine grounds for a Michigan divorce and indicated the mediator's transcription was accurate (with one minor acknowledged mathematical error) (Tr 3/7/88, 5). Petitioner's attorney, who *was* present, told the court:

> "Your Honor, it is my understanding that the parties will enter a settlement agreement separate from judgment, and it will be not part of the actual record, but copies of the agreement will be kept between the parties.
>
> The property settlement which is essentially outlines in Plaintiff's [Respondent's] Exhibit number One will actually be contained in a settlement, or a separation agreement.
>
> What the witness has in her hand, which is Mr. Feldstein's first draft, after the extensive mediation proceedings, is essentially an outline, a very complete outline without some enunciates and details that [the parties' counsel] have agreed will ultimately be included in the settlement agreement after judgment of divorce.
>
> *We have no objection to the exhibit being received.*" (Tr 3/7/88, 6-7) (Emphasis supplied)

Respondent's attorneys prepared a proposed judgment, but petitioner refused to sign it for entry. Petitioner's counsel prepared a draft of a proposed judgment (Tr 5),

and the trial court met with both counsel and suggested the mediator be called upon to review which proposed judgment accurately reflected the parties' settlement agreement (Tr 6). The mediator reported respondent's version was correct (Supplemental Report/Recommendation of Mediator, Respondent's Appendix B, B-2), but the trial court, nevertheless, conducted an evidentiary hearing to determine the basis of petitioner's objections to respondent's motion for entry of judgment.

At the beginning of the hearing, petitioner's counsel told the court that the mediator's report *was an accurate transcription of the parties' agreement:*

> "[THE COURT] . . . I guess my question is, did he [the mediator] record the whole agreement as it was stated or just their assent?
>
> [PETITIONER'S COUNSEL]: No. I believe, your Honor, that he recorded the whole agreement and, I believe, as recorded, the memorandum that he submitted to the Court is an accurate transcription of that.
>
> THE COURT: And both parties assented to that?
>
> [PETITIONER'S COUNSEL]: That is correct, your Honor. *And we don't take the position that we have not assented to that.*" (Tr 19) (Emphasis supplied)

As noted, the settlement agreement undertook to dispose of a marital estate of several million dollars. According to the essential terms of the property division, respondent was awarded the marital residence and most of its furnishings, a cash payment of $440,000 within six months of entry of judgment (Tr 160), and $1 million to be paid out over 10 years, plus 5% interest on the unpaid balance (Tr 162). Petitioner was awarded his several business concerns, worth approximately $2.5 million, a $3 million mansion in Bloomfield Hills, Michigan, a $2 million

home in Aspen, Colorado, his three foreign cars, about $300,000 in bearer bonds and other unregistered securities. The parties split petitioner's profit sharing plan equally. Alimony was reserved in the event he defaulted in the periodic payments.

At the evidentiary hearing, petitioner testified to his different understanding. There, he stated he thought the interest component on the $1 million payout was to be on the monthly payment, not the unpaid balance (Tr 278), and that he thought he only had to pay 65% of the sums agreed upon "after discounting for taxes" (Tr 281), prompting the trial judge to inquire, as follows:

> "THE COURT: Can I ask just one quick question to help us out? Who does that tax money go to?
>
> THE WITNESS: The government.
>
> THE COURT: Are you the government?
>
> THE WITNESS: No.
>
> THE COURT: Then why would you expect there would be a thirty-five-percent reduction on any payment that you're making?
>
> THE WITNESS: Because —
>
> THE COURT: Who's going to keep the thirty-five percent? Who is going to keep the thirty-five percent that you are keeping out of the payments? Who keeps it?
>
> THE WITNESS: I guess I do.
>
> THE COURT: So you're the government and you're collecting thirty-five percent on her payments?
>
> THE WITNESS: Oh, no. No. But I mean to be able to make the payment, I have to pay the government —"
>
> (Tr 281-282)

* * *

"THE COURT: Now, wait a minute. I'm going to be very serious about this.

THE WITNESS: Okay.

THE COURT: You're under oath.

THE WITNESS: Right.

THE COURT: I'm going to ask you to produce it.

THE WITNESS: Okay.

THE COURT: Have you ever paid a loan back in your entire life where the interest on the entire indebtedness, there was none, that the interest was only on the monthly principal payment? That's what you're suggesting here.

THE WITNESS: As a short period of time, no.

THE COURT: Talking about where there was no interest on the principal due but only interest on the monthly payment.

THE WITNESS: I need to call my accountant.

THE COURT: I don't think you probably ever have, Mr. Nicols. I don't think anybody ever has."

(Tr 312)

In his findings of fact on these two issues, the trial judge concluded that Feldstein's transcription of the agreement was clear in its understanding (Tr 333), that there was no fraud, coercion or mutual mistake (Tr 333), that petitioner entered into it after full consideration (Tr 334), and that "there was clearly an agreement" (Tr 337), but that petitioner's subsequent testimonial "interpretation" of the interest component and deduction for taxes was not credible:

"Now, with all due respect, any person of any average intelligence — and we're not talking about that here. Mr. Nicols, despite the delicately deni-

grating remarks of [defense counsel], is not a fool. He is not — not that you've said your client is a fool. But that he is not an inexperienced novice, he is a sophisticated businessman who has been extremely successful and is to be admired for that success. It's not something to be chastised for. But he understands dollars. He understands the term of payment and he understands the term one million dollars and he understands it's over and above aforedescribed cash payments. There's nothing in there that says it's alimony. And obviously he's paying her at that point in time for any interest she has in his estate, obviously. And it's what the monthly payments are. And then it's plus five percent interest thereon. And I'm sure — you know, it didn't say five percent per annum, it didn't say five percent a month or five percent a day. Common usage would say if you're going to buy something and what's the interest on it, it's ten percent, eight percent, ten, fifteen percent, common usage, business usage indicates that it is on a per annum basis, so obviously you're talking five percent per annum. You would have to accept [*sic*, most probably "except"] it in order to be anything different than that. I think you used the term 'incredible.' I don't think the Court said that. I think the Court said mind-boggling. And I think it is mind-boggling. With all due respect to Mr. Nicols, if he can sit here and think that he was going to reduce the payment of an interest in an estate by thirty-five percent can in no way, sh– first, I just don't believe it, frankly, and we make that as a finding. I just don't believe it. And, secondly, the language is crystal clear as to how it was to be done. There has been the testimony as to a discussion as to an amortization schedule, which is obvious. Mrs. Nicols wants to

> know how much she's going to get each month, how much she can anticipate five years from now, 'I'm going to be getting only X number of dollars.' So I am completely satisfied that there was an agreement entered into with full intelligence without any coercion. I find no coercion in that statement about he has one minute to decide, taking into consideration what the Court has said already about the amount of time, effort, and energy that had been expended up to that point. I find that argument without merit. That there was clearly an agreement." (Tr 336-337)

During the course of the hearing, other issues over which the Michigan trial court has continuing jurisdiction were raised by petitioner, such as whether the child visitation schedule meant weekly overnight visits during the school year (Tr 293-295), the extent to which he could decide which private school the children attended, and his participation in medical decisions affecting the children. Petitioner also questioned whether he was responsible for a $13,000 loan taken in his name alone, asked for specification of the furniture he was to receive from the marital home (Tr 293), and the amount of credit for prior payments of his wife's attorney fees, and which parent was to receive a dependency exemption for income tax purposes.

The trial judge noted the absence of a provision for overnight visitation during the week in the detailed schedule in the mediator's report (Tr 26), and ruled such a schedule would be too disruptive in any event (see Tr 31). He resolved holiday visitation questions (Tr 35), ruled petitioner was to consent to any elective medical procedures for the children (Tr 41-42), and ruled tax exemptions would alternate each year (Tr 49).

Petitioner wanted the word, "material" inserted, to describe "default," in the judgment provision reserving

alimony in the event he did not make the payments of the property division (Tr 62). The court urged the parties agree to a grace period in which to cure a default. Both sides accepted that alternative (Tr 65). Petitioner was allowed to specify which furniture and personal property he wanted (Tr 71-81; 90-91), and he agreed to vacate the residence by May 1, 1988 (TR 82). Petitioner received a credit against the attorney fee award for sums he had paid previously (Tr 113-116, 335), but was ordered to pay the outstanding loan balance taken out in his name alone (Tr 116-121, 335). Other minor language changes were allowed by the court, all at petitioner's insistence, further clarifying his rights and obligations.

In concluding his findings of fact, the trial judge construed his role in the hearing as "clarifying and interpreting" the parties' agreement"

> "I think I've said it, I'll repeat it again. Those matters were, in fact, questions of interpretation, questions of language, meaning, and the Court has interpreted it and gone through it and we have done that. The parties themselves, apparently, couldn't agree. The Court has assisted in that regard. The Court is not making the agreement. The Court is assisting in clarifying what that agreement is." (Tr 333)

The trial court granted respondent's motion for entry of judgment. The actual judgment has the handwritten notation "Default" written onto it.

Prior to entry of judgment, respondent's counsel discovered petitioner had recently re-mortgaged his Bloomfield Hills home for $1,500,000, in violation of injunctive orders, a secret transaction which jeopardized respondent's security interest in that property created in the judgment (Tr 353). As a consequence of this move by petitioner,

about which the trial judge found petitioner to have committed perjury (Tr 360), the court ordered the judgment to reflect additional protections for respondent (Tr 359). Judgment entered accordingly.

Petitioner appealed to the Michigan Court of Appeals which affirmed, holding the facts at the hearing supported the trial court's conclusion that there had been a "meeting of the minds" and a valid agreement, that petitioner was not credible in his claim of a mutual mistake, that the trial judge properly exercised discretion regarding child support, visitation, education and other matters and that the clerical mislabeling of the judgment as a "default" was of no consequence. The Michigan Supreme Court denied all petitioner's attempts for discretionary review.

Throughout this appellate litigation the only assertion by petitioner of a federal or constitutional right is contained in the following passage of his principal brief in the Michigan Court of Appeals:

> "Under these circumstances a default judgment was not properly entered. Letting the judgment stand would not only violate applicable court rules but would constitute a violation of [petitioner's] constitutional rights to due process. US Const, Am XIV; [Michigan] Const 1963, Art I, Section 17." (Petitioner's Michigan Court of Appeals Brief, p. 17)

Petitioner's Application for Leave to Appeal with the Michigan Supreme Court did not seek to expand that contention, no Michigan or federal decision was cited to either state court for that proposition, and neither the Michigan Court of Appeals nor Supreme Court ruled on a federal question.

REASONS FOR DENYING THE WRIT

I.

THE WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILURE TO PRESENT A FEDERAL QUESTION.

Respondent contends the single sentence in petitioner's 34-page appellate brief in the state appellate court, contending for the first time that he was denied a trial in violation of due process clauses of the Michigan and federal constitutions, is insufficient to present a substantial federal question. See *New York ex rel Bryant* v *Zimmerman*, 278 US 63, 67-68 (1928); *Beck* v *Washington*, 369 US 541, 553 (1962).

Petitioner's argument has been that he was entitled to a trial, but that is a conclusion with which no Michigan Court would have disagreed, *had it not been for the factual determination that he settled his case* on the very day trial was scheduled to begin. His assertion that the state denied him a federal right to trial when he chose not to appear in court on the trial date and his attorney told the judge the case was settled, should be deemed to have a hollow ring to it.

Accurately perceived, the record shows the factual conclusions of both the trial court and state appellate court that petitioner's claims about this case are not credible. In fact, he settled. In fact, both he and his lawyer told the judge the Feldstein memo was an accurate transcription of that agreement. In fact, petitioner was accommodated by the trial judge, several of his concerns were raised and resolved in his favor. In fact, no Michigan Court has decided a federal question. Respondent submits petitioner has not demonstrated grounds consistent with Supreme Court Rule 10.

The decision of the state courts rests on adequate and independent state grounds. Michigan law encourages settle-

ment of divorce litigation, *Hilley* v *Hilley*, 140 Mich App 581; 364 NW2d 750 (1985); *Madden* v *Madden*, 125 Mich App 54; 336 NW2d 231 (1983); *Tinkle* v *Tinkle*, 106 Mich App 423; 308 NW2d 241 (1981). A local court rule requires a settlement agreement to either be written and signed by the parties or counsel, or acknowledged in open court. MCR 2.507(H). Petitioner's challenge below was that there was no meeting of the minds essential to such an agreement. However, the state courts have measured petitioner's credibility, found the written evidence of the agreement, which petitioner acknowledged as his, to be clear and capable of understanding, and found there was a settlement by looking to the express words of the parties and their visible acts. *Stark* v *Kent Products*, 62 Mich App 546, 548; 233 NW2d 643 (1975).

Since this case was decided purely on issues of state law and findings of fact supported by the evidence, this Court should deny the writ because no Michigan Court was presented with a federal issue and none ruled on one, directly or by inference. *Herb* v *Pitcarin*, 324 US 117, 125-126 1945); *Murdock* v *Memphis*, 20 Wall 590; 22 L Ed 429 (1875); *McCoy* v *Shaw*, 277 US 302 (1928).

II.

THE WRIT OF CERTIORARI SHOULD BE DENIED FOR FAILURE TO DEMONSTRATE A DENIAL OF PROCEDURAL OR SUBSTANTIVE DUE PROCESS.

Respondent finds it necessary to dispute petitioner's assertion "that no (settlement) agreement was made in open court" (Petition for Writ of certiorari, p. 19). Both the trial court and the Michigan Court of Appeals found as a matter of fact the parties had complied with the state court rule governing settlement agreements, MCR 2.507(H):

> "In the instant case on the date scheduled for trial, counsel for the defendant advised the court that the parties had reached a settlement in accordance with the terms contained in the mediation 'memorandum of agreement.' Indeed, at the evidentiary hearing held in August 1988, defendant did not deny that an agreement had been reached by the parties through mediation, but merely disputed some of the terms and stated that he misunderstood the tax consequences. Defendant acknowledged that he had agreed to the major provisions of the property settlement: that he had agreed to pay to plaintiff $1 million over 10 years; a $440,000 payment to plaintiff; and a $175,000 payment for her attorney fees. We therefore conclude that the property settlement agreement between the parties, as outlined in the mediation memo, was binding on the parties, and defendant's argument that any purported stipulation was revoked is without merit." (Court of Appeals' Opinion, Petitioner's Appendix p. C-4)

Respondent submits such findings of fact are not subject to review. *Grayson* v *Harris*, 267 US 352, 358 (1925).

Petitioner's claim that he could revoke his settlement, and his citation to *Norton Shores* v *Carr*, 59 Mich App 561; 229 NW2d 848 (1975) does not correctly state Michigan law. *Michigan Bell Telephone Co* v *Sfat*, 177 Mich App 506, 515-516; 442 NW2d 720 (1989) explains:

> "An agreement or consent made in open court by the parties or their attorneys is binding on the parties. MCR 2.507(H). A party cannot, after agreeing in open court, refuse to sign a proposed judgment which accurately incorporates the agreement unless there was mistake, fraud, or unconscionable advantage which would justify setting aside the settle-

> ment agreement. *Meyer* v *Rosenbaum*, 71 Mich App 388; 248 NW2d 558 (1976). Defendant relies on *City of Norton Shores* v *Carr*, 59 Mich App 561; 229 NW2d 848 (1975), in furtherance of his position. That case appears to hold that a litigant is free to revoke a consent judgment between the time it is orally placed on the record and the time the judgment is actually entered by the court. To the extent that *Norton Shores* stands for that proposition, we join those cases which have since unanimously rejected its apparent holding. See, e.g., *Siegel* v *Spinney*, 141 Mich App 346, 349; 367 NW2d 860 (1985); *VanWagoner* v *VanWagoner*, 131 Mich App 204, 212-213; 346 NW2d 77 (1983); *Michigan Nat'l Bank of Detroit* v *Patmon*, 119 Mich App 772, 777-778; 327 NW2d 355 (1982); *Meyer*, *supra*, pp 392-393. This is not a situation where an attorney enters into a consent agreement without the approval of the party. See *Patmon*, *supra*, pp 776-777."

Thus, *Norton Shores* has been effectively overruled.

Moreover, the changes and additions in the ultimate judgment, which are different from the mediation report, were brought about by petitioner at the evidentiary hearing, and inure to his benefit. Petitioner has had all the process that is due.

The resulting division of property effected by the Court, through the parties' settlement, is not arbitrary or capricious, and does not amount to a denial of substantive due process. This was not a case where an unsophisticated litigant was coerced to accept the terms of a complex financial settlement without full understanding. Petitioner, a successful businessman, a multi-millionaire, acknowledged he had agreed to pay his wife a million dollars within 10 years but testified under oath that he didn't understand the

5% interest rate was to be charged on the unpaid balance; and he said he thought he only had to pay 65% of the other amounts he agreed to pay.

During the years of trial court litigation, petitioner was shown to have secreted assets, gave untruthful interrogatory answers, and has vowed his wife will receive "not one dime" of the marital estate or the terms of his own agreement. After all Michigan Courts repeatedly denied petitioner a stay of proceedings, he hired new counsel to file bankruptcy for him, in order to stay the judgment. There, as a debtor in possession, he listed his assets were worth millions more than before. Under the terms of his settlement, petitioner will receive substantially less than 50% of the marital estate.

It is obvious that petitioner has no basis for complaint and that his property rights were safeguarded by the Michigan Courts, both procedurally and substantively.

CONCLUSION AND REQUEST FOR RELIEF

Wherefore, Respondent, Lynne J. Nicols, respectfully requests this Honorable Court deny the Writ of Certiorari to the Michigan Supreme Court.

Respectfully submitted,

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By: /s/ WILLIAM G. WOLFRAM
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DATED: May 10, 1991

APPENDICES TO BRIEF IN OPPOSITION

• • •

APPENDIX A

FEBRUARY 29, 1988 LETTER FROM MEDIATOR
(Plaintiff's Exhibit 1)

LAW OFFICES
HENRY BASKIN, P.C. BASKIN AND FELDSTEIN ROBERT Z. FELDSTEIN, P.C.
30200 TELEGRAPH ROAD - SUITE 137 - BIRMINGHAM, MICHIGAN 48010 - (313) 646-3300

Hon. Gene Schnelz
Oakland County Circuit Judge
1200 North Telegraph Road
Pontiac, Michigan 48053

February 29, 1988

RE: Nicols, Lynne v. Robert
Civil Action No. 85-290 611-DM

Dear Judge Schnelz:

I am most pleased to report to you that the Mediation Hearing which I conducted on Saturday, February 27, 1988 from 9:30 A.M. until almost 6:00 P.M. resulted in full agreement as to all issues in dispute.

Enclosed herewith the Court will find a Memorandum which recapitulates the terms and provisions of the agreement reached with the considerable assistance of attorneys Blank and Lowenthal for the Plaintiff and attorneys Carson and Cole-Pierce for Defendant. The Memorandum was dictated in the presence of both Mr. and Mrs. Nicols and placed upon the tape which recorded that portion of the proceeding.

It is my understanding that counsel will, in the very near future, accomplish such clarification or refinement of these terms and conditions as may be necessary so that a pro-

posed Judgment of Divorce and related Qualified Domestic Relations Order might be prepared, approved and presented for entry at Court at such time as the Plaintiff offers proofs relative to the jurisdictional and other statutory requirements.

In view of the length of the Saturday proceeding and the complexity of the issues confronted, the Memorandum is no doubt unavoidably phrased in rather clumsy and/or rambling fashion, but it will, I am confident, substantially assist counsel in their preparation of the required Judgment.

I am pleased to have been able to assist the Court, litigants and their counsel in disposing of this very long-pending action.

Extending best personal regards, I remain,

Very truly yours,

RZF:pmb Robert Z. Feldstein

Enc.

cc: Mr. Charles E. Blank and
Ms. Betty L. Lowenthal
Attorneys for Plaintiff
(Copy of Memorandum enclosed)

Mr. Robert M. Carson and
Ms. Anne Cole-Pierce
Attorneys for Defendant
(Copy of Memorandum enclosed)

Bruce O. Wilson, Esq.
Co-Counsel for Plaintiff

Joseph Cunningham, C.P.A.
Don B. Gill, C.P.A.

APPENDIX B

SUPPLEMENTAL REPORT/RECOMMENDATION OF MEDIATOR

(State of Michigan – Circuit Court – County of Oakland)

(Dated June 22, 1988)

(LYNNE J. NICOLS, Plaintiff, -vs- ROBERT T. NICOLS, Defendant — Civil Action No. 85-290 611-DM)

This matter was submitted to Mediation which was conducted February 27, 1988 from 9:30 A.M. until 6:00 P.M., resulting in what the Mediator understood to be a full agreement as to all issues in dispute, as memorialized by a certain Memorandum of that date, copies of which were provided the Court and counsel of record with transmittal correspondence of February 29, 1988.

Subsequent thereto the Mediator met with counsel for the respective parties, at the Court's request, at the Oakland County Circuit Court House on May 18, 1988.

Thereafter, the Mediator has received from counsel for the respective parties differing proposed Judgments of Divorce, accompanied by cover correspondence evidencing the Court's desire that these respective versions of proposed Judgments be reviewed by the Mediator toward the end of submission of a report/commentary to the Court.

The following constitutes that "commentary" and is issued as the Supplemental Report/Recommendation of Mediator.

1.

PREFERRED VERSION OF PROSPECTIVE JUDGMENT

After reviewing the Memorandum of Agreement, dated February 27, 1988, and reflecting upon the discussion

and/or agreement occurring at the jury room of the Hon. Gene Schnelz May 18, 1988, and after a comparative review of the proposed Judgments, it is the Mediator's determination that the version prepared by counsel for Plaintiff, LYNNE J. NICOLS, is in conformity with that which was earlier agreed to, as clarified May 18, 1988 and as further modified by some post-mediation agreements obviously reached by and between the parties and their respective counsel, as incorporated in the proposed Judgments. The Mediator would, upon the basis of the foregoing, further determine that the Amortization Schedule attached to Plaintiff's proposed Judgment as Exhibit A, fairly and accurately reflects the property settlement payout obligation (principal and interest) owed by Defendant to Plaintiff.

II.

ENUMERATION OF THE MATERIAL ERRORS, OMISSIONS OR MISSTATEMENTS IN DEFENDANT'S PROPOSED JUDGMENT UPON WHICH THE MEDIATOR'S FOREGOING DETERMINATION WAS REACHED THAT THE PLAINTIFF'S PROPOSED JUDGMENT OUGHT TO BE ADOPTED

VISITATION

Pages 3-4 – Overnight visitation has improperly been inserted in subparagraphs B and C.

MEDICAL, DENTAL, ETC. FOR MINOR CHILDREN

Page 5 – The need for Plaintiff to secure the consent of Defendant as to elective medical procedures has been improperly inserted.

DEPENDENCY DEDUCTION FOR CHILDREN

Page 6 – This tax privilege improperly inserted.

PRIVATE SCHOOL EXPENSE

Page 6 – The choice of private school by Defendant has been improperly inserted.

ALIMONY

Page 6 – The word "material" has been improperly inserted as to Plaintiff's right to invoke the reservation of alimony clause.

PROPERTY SETTLEMENT

Page 9 – "Furniture in the den" has improperly been inserted in subparagraph B, and the previously-agreed upon date of vacating of premises by Defendant has been erroneously extended.

Page 10 – Language in subparagraph C 1) relative to "credits" not agreed to and improperly inserted.

Subparagraph D improperly incorporates a reference to "tax effects" and a subsequent paragraph 17 H which has been, in its entirety, improperly incorporated, and further this subparagraph erroneously sets forth the interest rate as applicable to "each payment" rather than as to the unpaid balance.

Page 12 – The top paragraph seems to ambiguously and/or duplicatorily deal with what would constitute "net sales proceeds".

Subparagraph F adopts a division date of February 27, 1988 relative to distribution of Profit Sharing Trust balances while, in view of the significant passage of time for Mediation, date of entry of Judgment would be more equitable.

Page 13 – Subparagraph 17 H never agreed to and not incorporated in Mediator's Memorandum of Agreement and should be stricken in its entirety.

Page 16 – Subparagraph I inequitably utilizes date of February 27, 1988 in view of passage of time since Mediation with date of entry of Judgment to be preferred.

Subparagraph J – No agreement was reached, nor does the Memorandum contemplate, any "credit against payments due Plaintiff-Wife," with the Mediator puzzled as to what is meant by this subparagraph.

Page 17 – Top paragraph (part of paragraph 19) refers to the "repayment of debt," while the Memorandum of Agreement reached following the initial and lengthy Mediation simply referred to "legitimate household, family or business expenditures."

COUNSEL/EXPERT WITNESS FEES AND COSTS

Page 20 – The final two sentences of this provision would, in view of the fact that they did not constitute part of the agreement earlier reached, require deletion.

SECURITY AND INJUNCTIVE PROVISIONS

Page 20 – The bottom line would suggest that the word "not" has been inadvertently omitted and should be inserted between the words "shall" and "directly."

Page 21 – The last three words on the bottom of Page 21 and the remaining portion of the provision at the top of Page 22 should be deleted, not having been earlier agreed upon at Mediation.

Page 22 – Paragraph 31 – The Receiver's duties to engage in "proper marketing activities," while perhaps an ultimately beneficial requirement was not agreed upon at the time of Mediation and may, in view of the language chosen, pose such ambiguity as to create additional problems.

III.

MEDIATOR'S OPPOSITION TO ATTENDANCE AT HEARING AND/OR OFFERING OF TESTIMONY

It is respectfully submitted that, as a quasi-judicial officer, the Mediator may not, despite the transmittal correspondence of respective counsel, appear as a witness at any hearing, interpretative or otherwise, with this Supplemental Report/Recommendation of Mediator submitted for the consideration of the Court and respective counsel in lieu thereof and as a final effort on the part of the Mediator to resolve discrepancies between the proposed versions

of Judgment of Divorce and the Memorandum of Agreement earlier circulated in this cause and the subsequent Court House conference hereinbefore described.

Respectfully submitted

ROBERT Z. FELDSTEIN, P.C.
Court-Appointed Mediator

Dated: June 22, 1988